

MALPRACTICE
AS APPLIED TO
CHIROPRACTORS

HOLMES

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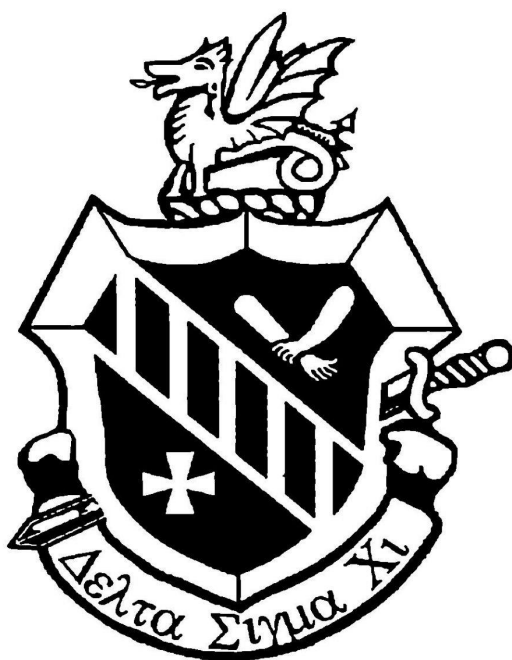
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MALPRACTICE AS APPLIED TO CHIROPRACTORS



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Mr. Holmes of the firm of Morris, Winter, Esch and Holmes, has been associated with me for some years past. With the increasing activity in the form of malpractice suits, it was thought well to write a book which could be of some help to the Chiropractor and devoid of many legal problems which are only interesting to attorneys. Several questions and problems not yet settled, are not discussed, and as soon as settled by the courts, information concerning them will be given.

TOM MORRIS.

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CHAPTER I.

MALPRACTICE IN GENERAL

A working knowledge of the rules of malpractice from the standpoint of Chiropractic is something which every Chiropractor should give consideration and some study. Like a merchant or M. D., the Chiropractor has for his business the practice of Chiropractic. Like any other business or profession it has its rules and its pitfalls wherein the practitioner may lose the savings of a lifetime if he is not careful and observes the rules, or has not insurance to protect him against loss.

Many a merchant has successfully saved a nest egg only to see it washed away by lawsuits because he did not know the rules of the game, and made some slip which he could have avoided. It is just as necessary for the Chiropractor to know the rules of his profession as it is for the business man. Law is often called the rules of the game, the rules which govern the relations of human beings to one another. There are a great many branches of the law, such as maritime law, patent law, criminal law and corporation law, all of which deal specially with the rules regarding their own branch. The law of malpractice, as it is sometimes called, comes under the general law of negligence.

At the very beginning it is necessary to determine whether to write this book for the use of Chiropractors or for the use of lawyers. As this book is intended for the Chiropractor's use and guide, his interests will be considered instead of the attorney, who would be interested only in a maze of technical differentiations which would be uninteresting to the Chiropractor who wishes to discover the proper things to do and

to avoid. Please, then, Mr. Chiropractor, when you read this book, approach it with the idea of ascertaining or discovering the safe things to do, and the things to avoid. From that angle you will derive the most benefit. But if you read this book with the sole idea of seeing how close to the line of law you can go, please remember if you keep sticking your finger continuously up to the fire some day it will burn you.

In the first place, after Chiropractors have graduated from their school with a full knowledge of Chiropractic, it then becomes necessary for them to apply that knowledge to their practice, having regard to the rules of malpractice.

The contractor when he builds a house knows the risk he takes in getting payment, the kind of care he must employ in building the house, the amount of damages he would have to pay for bad work, for failure to finish on time, who would bear the loss in case of fire, etc. In other words, the contractor must know the risk which he assumes, and failure to know that risk means the opportunity or probability of bankruptcy.

The Chiropractor, when he opens his office, must know what risk he assumes when he places the word CHIROPRACTOR on the door, what risk he assumes when he advertises in the newspaper as a Chiropractor. He must further know what added risks he assumes when he advertises baths, electricity, massage and X-ray as a treatment for diseases.

The Chiropractor should know what risk he assumes when he gives an adjustment, or what risk he runs in making a diagnosis or advising salts, and what the damages would be in case the diagnosis is wrong, or in case "salts" proved to be the wrong method. Damages is the money equivalent which the Chiropractor must pay the patient for his injuries if the court and jury decide he made a mistake through negligence.

To be more exact, the Chiropractor must understand how far he can go safely, the limitations of his practice and profession and the quicksands and snares of the M. D.'s when the Chiro-

practor steps out and beyond the limitations of Chiropractic.

The Chiropractor must know what it means to guarantee a cure, and if he should fail, the damages he would have to pay.

These subjects and others will be taken up in the following chapters so that the Chiropractor may know and understand the rules of his profession, and so that he may know and determine the risks and dangers which lie ahead. With this in view it is desirable to point out to him the broad path upon which he may travel and feel safe.

Insurance is another subject which Chiropractors should understand thoroughly. Especially is this true of insurance against possible damage suits arising from malpractice. The Chiropractor who owns an automobile knows it may be stolen or burn up, and he guards against that by insurance. He knows the possibility of hitting or injuring a person with an automobile, with the resultant damage suit for anywhere from \$100 to \$50,000. He gets insurance against this and the insurance company hires experienced lawyers to fight the case. The Chiropractor should know and understand the principles of fire insurance, theft insurance and life insurance. You see a fire, with a loss of thousands of dollars, and you find it is fully covered by insurance. You read of something stolen and hear of the insurance company paying the loss. You attend a friend's funeral and are agreeably surprised to hear he left twenty or fifty thousand insurance for his wife or children. You all know that fires are certain, that men always die and the same principles apply to suits for malpractice. You may be careful today, more careful tomorrow and a slip on the third day may bring you a malpractice suit. Of course, the obvious thing the prudent man does is to protect himself by insurance. Of course you may carry your own insurance, but no successful business man does, while the wise business man or Chiropractor takes out a policy of insurance and pays a little each month or year, instead of paying out five or ten thousand at once. Then the business man knows he is safe. The answer, of course, is to get malpractice insurance if you can get it.

In discussing the subject of malpractice the reader may be surprised at the use of the words "diagnosis", "treat" and "school of medicine", and further surprised to hear Chiropractic spoken of as one of the schools of medicine.

Therefore, when reading this work, bear in mind that this book is not written from the professional side of Chiropractic but from the decisions of courts in malpractice cases. Kindly observe that the writer believes that the Chiropractor should always stick to the Chiropractic terminology, and should use "adjust" instead of "treat", first because of the necessity of distinguishing between Chiropractic and allopathic medicine and for the further reason that Chiropractic adjustments are in reality different from allopathic or M. D. treatments.

The writer further believes that the Chiropractor should always use the words "Chiropractic Analysis" instead of diagnosis, both to distinguish the method of the Chiropractor from allopathic medicine and for the further reason that Chiropractic analysis is in reality different from allopathic or M. D. diagnosis.

But for the purpose of discussing malpractice it is necessary to get another viewpoint, the viewpoint of the courts in malpractice cases, for the courts make the rules of law applicable to all malpractice cases and it is in the courts that the cases are to be tried. Therefore it is necessary to get the legal viewpoint.

For instance, when the courts in malpractice cases speak of medical science, or the science of medicine, the court does not necessarily mean the allopathic physician or the eclectic physician but means broadly any and every science aimed to restore the patient to health. Under this head in malpractice cases the courts have held that in this broad science, sometimes perhaps mistakenly spoken of as the healing art, there is included many different systems, as Christian Science system, allopathic system, homeopathic system, Eclectic system, Osteopathic system, Thompsonian system, water cure system, and Chiropractic system, and all of these systems are spoken of as different schools of medicine or different schools of medical science or different schools of the healing art.

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Thus every time you see in this book or in some law report the words "school of medicine" do not jump at the conclusion that it means the allopathic school of medicine, for there might be meant the Christian Science school of medicine. You may laugh and say there cannot be any Christian Science school of "medicine" because Christian Scientists give no medicine. You may laugh at the absurdity of such decisions but bear in mind that the term "medicine" as used in this case does not mean drugs but instead a generic term to include all systems which aim to restore the patient to health.

It is a great deal like saying, "The White system of the Black color". However absurd it is, you must however get that viewpoint to understand the legal decisions on malpractice.

Therefore, from the malpractice viewpoint there are the following schools of medicine:

1. Allopath
2. Homeopath
3. Christian Science
4. Eclectic
5. Thompsonian
6. Osteopathic
7. Chiropractic, (which for the purposes of malpractice suits is classed as a school of medicine.)

Now bear in mind that all of these systems are separate and distinct and the reader immediately asks: "How are they separate, and how does the court determine what is a school?"

This was decided in a basic case which is reproduced in whole in this book—*Nelson vs. Harrington*, 72 Wis. 591. This was a case of a clairvoyant physician. The rule laid down in that case is that to constitute a recognized school of medicine, there must be a theory of principles and practice concerning disease, the diagnosis, and the remedy, which all the members of that school profess and are required to follow. This means that there must be some theory concerning disease or the cause thereof.

Every reader will be familiar with the Chiropractic theory of disease.

Now what does "diagnosis" mean from the angle of the court in determining whether there is a separate school or not? "Diagnosis" means finding out what is wrong with the patient or, "what is causing the disease according to the above theory of disease." In the Chiropractic theory this would be by palpation, X-ray, nerve tracing, etc. In the Allopathic School it would be to give a medical name to a group of symptoms or a condition. In the Christian Science school it would probably be to ascertain the spiritual error.

Now, although spinal analysis is different from medical diagnosis, the courts have held it really means finding what is wrong with the patient according to the school or theory of disease.

In determining whether there is a separate school what does the court mean when it speaks of the remedy? It does not necessarily mean medicine but it means whatever that school uses or does to restore the patient to health or eliminate the cause of disease.

With the allopath physician it would be whatever medicine was prescribed or surgical operation performed and with the Christian Scientist whatever was done to correct the spiritual error. In Chiropractic it would be the adjustment of the articulations of the spine.

These principles above enumerated must be professed and followed by the members of that school.

The question now comes: "Why is it necessary to be a school of medicine?" "Why is it necessary to prove Chiropractic is a separate, distinct and different school or system of medicine in a malpractice case?"

Because when Chiropractic has been established as a school separate from allopaths, homeopaths, eclectics, osteopaths, then the Chiropractors' actions are judged according to the standards of the Chiropractic school or system and not according to the

allopath school. The learning and skill required is then the learning and skill of the ordinary Chiropractor, not of the physician and surgeon.

Therefore, in this work the writer will use the word "diagnosis" in the same manner as the courts have used it and when it is mentioned that a Chiropractor diagnosed, it is meant a Chiropractor made a spinal analysis, etc., and when an allopath physician diagnosed it would be to give a medical name to a group of systems or conditions.

Further, the courts use the word "treat", meaning to apply the remedy. The writer will also use the word treat (although against his principles) and when so used in connection with a Chiropractor will mean solely adjustment, and when used in connection with an allopath will mean such remedies as are prescribed by that school.

The Chiropractor, when reading this work on Chiropractic, must remember that the rules of criminal law are different from the rules of civil law. A Chiropractor in his practice does not use the word diagnose or treatment and in criminal trials that is the testimony given by patients.

This work is not meant to enable the Chiropractors to escape responsibilities which they should assume, nor any of the liabilities which they owe to the public or the duties which they owe their patients, but it is intended to show to the Chiropractor what duties the Chiropractor, as a professional man, owes the public in general, and to his patients in particular.

Chiropractic is now a science unto itself. It is separate and distinct from allopathic medicine and from osteopathy, or any other form or system of healing. It has its own particular methods of ascertaining the cause of disease, and its own particular means of eliminating the cause and allowing innate to restore the patient to health. Its strides the past twenty-five years have been marvelous and it has overcome the opposition and hatred of several other health sciences, some of which still persist in their efforts to belittle Chiropractic. However, the results count and there are

now in the United States millions of satisfied Chiropractic patients who recognize Chiropractic as the most simple and still the most efficient system in the science of health which exists today. Many Chiropractors realize the wonderful thing which they have in the form of a science. They realize that so far as the health science is concerned, it is the best of any so far devised or thought out.

With a science of this merit, it is small wonder that the Chiropractors themselves have become, in the true sense of the word, professional men, who are looked up to by their community, and respected by their fellow men.

These same Chiropractors are given the credit of many marvelous cures by their patients. These same Chiropractors have indeed grown with the profession and now the true Chiropractor regards his profession as being above the allopathic branch of medicine and surgery, and by far the great majority of them refuse to be called "Doctors" because they feel that it may smell and attach them in some way to the allopathic profession which has been persecuting them in the past quarter of a century.

However, this elevation of the Chiropractor to the ranks of the profession—has brought with it its responsibilities. 1) There is the responsibility to the patient, which is one of the many questions which is dealt with in this book. 2) There is the responsibility to themselves, and 3) which is probably the most important, the responsibility to the profession and to their science. It is this last responsibility which exacts from them a loyalty to Chiropractic—the science which they are furthering in the world and from which they derive their daily bread and butter.

To fulfill their responsibility to the profession, the Chiropractors must be careful that every act and every word should be such as to elevate the profession. The Chiropractor, in each town in which he practices, stands as a representative of the Chiropractic profession, and his every act, including his morality, will have some bearing upon the way the people of the community think of Chiropractic. To fulfill their obligations to the profession, the Chiropractor must endeavor to keep the profession clean

and to do this must live clean and upright lives, with a high standard of honor, both as respects the public and as respects the patient. There may come a time when, for the advancement of the Chiropractic science some sacrifice may be asked of the individual Chiropractor, and as has always been true in the past, the true Chiropractor will make this sacrifice gladly. With this in mind, the Chiropractor must, at all times, bear himself as a professional man on the same plane and on the same standing as other professional men in the community.

Another burden which is placed upon the Chiropractor when he becomes a professional man, is the requirement that all professional men do something for humanity, just as the profession of law must take the poor and indigent cases and those who have no money, so the Chiropractor must lend a helping hand to all those suffering atoms of humanity which he can help with his wonderful science of Chiropractic, and if they cannot pay, he must recognize that as one of the burdens which is imposed upon the professional man. He must cherish his profession as it is now being cherished by the world. Even the Courts, after a long struggle, have decided that Chiropractic is a recognized system of health science and that it has its merits, as are testified to in many cases. Their opinions are as follows:

"The Court thinks that CHIROPRACTORS CANNOT BE CLASSED ALONG WITH CHARLATANS AND FAKIRS. This science is well developed and recognized in many jurisdictions and MANY BELIEVE IN ITS EFFICACY.

"It is not suggested in the record that the practice of the science is in any way deleterious to the human body." (The Supreme Court of Tennessee in the case of Maude Hastings et al., appellants, vs. Dr. Norman, et al., representing the Medical Boards.)

The *People of Illinois vs. Love*, 298 Ill. 304; 131 N. E. 809, says as follows:

"It is not the province of the courts to extol or belittle Chiropractic, osteopathy or medicine and surgery. They are all now

established as useful professions, and as time has progressed it has been thoroughly demonstrated that all of them accomplished and are daily accomplishing the relief and cure of human ailments. Constantly comes the proof before the Courts that Chiropractic * * * does enable the Chiropractor to relieve and cure many of the ailments of human beings and that the practice of this science is in no way deleterious to the human body."

Therefore, this book should be read not with the idea of escaping any responsibilities, but of advancing the profession of Chiropractic in the world and establishing a safe zone through which the Chiropractor may perform his works without the fear of the jealousy of other professions.

CHAPTER II.

RELATIONSHIP BETWEEN CHIROPRACTOR AND PATIENT

The first thing to consider is the relationship which is established between the Chiropractor and the patient.

When the Chiropractor starts out, he may probably advertise in the newspapers, by means of cards, leaflets, circulars and other literature, personal conversation and by titles and words upon the office door and windows.

By these means the patients are attracted to him and the relationship of Chiropractor and patient begins. Just what that relationship is, depends a great deal on the conversation between the Chiropractor and the patient, on the signs and advertisements which the patient has read, and which brought him to the Chiropractor. For instance, (1), the Chiropractor may have established a relationship whereby the Chiropractor guaranteed a cure. (2), The Chiropractor may have held himself out as a baby specialist and be liable as such. (3), The Chiropractor may have led the patient to believe that he was an allopathic or homeopathic physician, in which case he would be liable as such, or (4), finally the Chiropractor may have simply represented himself as a Chiropractor.

This will be considered first, the kind of relationship which is established between the patient and the Chiropractor by simply holding one's self out as a Chiropractor.

First the law says that the patient is the employer and the Chiropractor the employee.

Gillette vs. Tucker, 67 Ohio St. 106; 65 N. E. 685.

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Speaking of duties of physicians, the opinion of the Court reads:

"Especially is this true of contracts growing out of an employment quasi public in nature, like that of a professional man. Thus the care and skill which a professional man guarantees to his employer are elements of the contract unto which he enters by accepting a professional engagement."

Bigney vs. Fisher, 26 R. I. 402; 59 Atl. 72.

Following:

Pike vs. Honsinger, 155 N. Y. 201; 49 N. E. 760; 60 Am. St. Rep. 655.

When you go further into the matter note carefully what the Chiropractor represents when he takes that employment.

"In an action against a physician for malpractice, a charge that where one holds himself out to the public as a physician, the law implies a promise that he will use reasonable skill and diligence in the treatment of those employing him, and a charge that a physician need not exercise extraordinary diligence or care in treating a patient, but only reasonable care, and that a physician is not responsible for errors of judgment or mistake in matters of doubt, when taken together, properly declare the law defining the duty of a physician."

Hales vs. Raines, 130 S. W. 425, 146 Mo. App. 232.

"A physician and surgeon by taking charge of the case, impliedly represents that he possesses, and the law places upon him the duty of possessing, that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality where he practices and which is ordinarily regarded by those conversant with the employment as necessary to qualify him to engage in the business of practicing medicine and surgery. Upon consenting to treat the patient it becomes his duty to use reasonable care and skill, and the application of his learning to accomplish the purpose for which he was employed. He is under the further

obligation to use his best judgment in exercising his skill and applying his knowledge."

From the foregoing decisions it is apparent that the Chiropractor and patient have entered into a contract of employment whereby the Chiropractor owes certain duties to the patient.

The case just cited says that it is a quasi-public employment and by that is meant a partially public employment, or an employment wherein the Chiropractor offers his services to the public in exchange for money but at the same time reserves the right of rejecting any and all prospective patients.

To put the matter shortly, the Chiropractor represents that he is a competent Chiropractor. Now, of course, every Chiropractor thinks he is a competent Chiropractor much in the same way as every man considers himself more or less of a poker player.

The word "competent" means answering to all requirements; adequate; sufficient; suitable; capable; fit.

Kings Lake Drainage and Levee District vs. Jamison, 75 S. W. 679; 176 Mo. 537.

But whether you are or are not a competent Chiropractor is a question which the jury has to pass upon.

The definition of a competent Chiropractor is something which the practitioners must get a definite idea of. It does not follow that because a Chiropractor has graduated from any one of the different schools that he is competent, because he may have been a very good man but still have gotten a very poor education on account of the poor quality of the school.

Of course, if the Chiropractor himself is very poor timber it is very hard for any school to make a competent Chiropractor out of him or a competent anything else. That, of course, is the human equation which enters into all professions.

The only safeguard which the prospective student or Chiropractor can use is to choose the school which gives the real education and the real knowledge and skill in the practice of Chiropractic. The Chiropractor must do more than go to any "two

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by four" school which has "Chiropractic School" advertised above its doors, because it is up to the Chiropractor and to every person who intends to take up Chiropractic to be a competent Chiropractor so that in cases of malpractice he can come up to the standard of competency, which will save him a lot of expense and trouble in malpractice suits.

The Chiropractor's problem then is this: First, to get an education from a competent school which will teach him the correct and true principles of chiropractic and enable him to become proficient in the skill and art of adjusting.

Noticing the above abstracts from the decisions quoted, you will notice that the term "competent chiropractor" is a variable term, that is, the meaning of the term changes. What was a competent Chiropractor ten years ago may be an incompetent Chiropractor today, and one who is competent today may be incompetent five years from now because, as the rules state, regard is to be had to the advanced state of the profession at the time.

This means the Chiropractor must keep abreast of the times, and probably should keep himself informed by means of conventions, clinical journals, review courses and other means of information. This does not mean that the Chiropractor should rush and try every new experiment or new fangled notion. However, when an experiment has been proven, and is approved generally by the profession, then the ordinary Chiropractor should commence its use.

However, attention will be called later to the risk run by the Chiropractors in adopting or using methods not generally approved. In other words, there is some danger in getting too far ahead of the procession, and adopting new fangled methods not approved.

It will be further seen from this definition quoted from the above law extract, that the Chiropractor represents, that he possesses such a reasonable degree of learning and skill, as is ordinarily possessed by Chiropractors in the same or similar localities. It will be seen that two things are represented, one of which is a

reasonable degree of learning, and the other is a reasonable degree of skill. These are two separate and distinct things, a reasonable degree of learning, may be acquired at a Chiropractic school or through study, and a reasonable degree of skill means ability to use and put into practice that learning. Some people are naturally skillful, some naturally clumsy, and sometimes the naturally clumsy person may become reasonably skillful through practice. There may be Chiropractors who have a reasonable degree of learning, but who cannot use and put into practice that learning because of lack of skill.

On the other hand, there are Chiropractors who have skill but have not such a degree of learning as to know when and where to apply that skill. Either one of the last two named do not come up to the standard which the ordinary Chiropractor represents, that is, that he possesses such a reasonable degree of learning and skill as is ordinarily possessed by Chiropractors in the same or similar localities. The average Chiropractor, however, further represents that he will in the adjustment of a case employ such learning and skill to accomplish the purpose for which he was employed. In other words, first the Chiropractor represents that he possesses the learning and skill of the ordinary Chiropractor, and second, that when he is employed that he will use such learning and skill to accomplish the purpose for which he was employed.

Again you will notice the distinction between having the skill and using it. As in all walks of life some people have the skill and the learning but do not use it and fail to get results. And then there are also persons who have neither skill nor learning, and when they attempt to use the poor equipment they have, they also fail to get results.

All of the above is what the ordinary Chiropractor represents to the patient before he gets the employment. Immediately that the Chiropractor gets the employment or consent to treat a patient it becomes his duty to use reasonable care and diligence in the exercise of his skill and learning.

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He is also under the further obligation to use his best judgment in exercising his best skill and applying his knowledge.

The whole proposition it will be noted is one of degree. The dentist in the town of Danville, Illinois, holds himself out as having that degree of learning and skill as is ordinarily possessed by other dentists practicing in towns similar to Danville. This means more learning and more skill than that possessed by a dentist in a town of 100 population and, on the other hand, it does not mean as much learning and skill as that ordinarily possessed by dentists in a much larger city, for instance Chicago.

Now if that dentist decides to advertise as an oral surgeon then his amount of learning and skill must increase to that commensurate with the learning and skill ordinarily possessed by oral surgeons in similar localities. Still the learning and skill required is more than if he were practicing in a town of 100 and, on the other hand, is less than if he were practicing in a city like Chicago.

In *Ferrell vs. Ellis*, 105 N. W. p. 993; 129 La. 614, a very well considered case, the Court says:

"The standard of skill and learning required in any case is that reasonable degree of skill and learning ordinarily exercised by the members of the profession at the time of the treatment in question, having regard to the advanced state of the profession at the time." This was erroneous in not limiting the degree of skill and learning to that ordinarily possessed by physicians and surgeons practicing in similar localities. Citing authorities:

Whitsell vs. Hill, 101 Iowa, 629; 70 N. W. 750; 37 L. R. A. 830.

Decatur vs. Simpson, 115 Iowa, 348; 88 N. W. 839.

It must always be borne in mind further that this degree of learning and skill depends upon the advanced state of the profession at the time.

This view is further taken in the case of *BAKER vs. HANCOCK*, 63 N. E. 323, where in speaking of the MEASURE OF DUTY owed by physicians to the patients the Court says:

"The measure of duty of a general practitioner is that he does not undertake absolutely to cure but is bound to possess and exercise the average degree of skill possessed and exercised by members of the profession practicing in similar localities." Citing other cases.

Gramm vs. Boener, 56 Ind. 501.

Smith vs. Stump, 12 Ind. App. 359; 40 N. E. 279.

Whitsell vs. Hill, Ia. 70 N. W. 750; 37 L. R. A. 830 and note.

Berknell vs. Hosier, 10 Ind. App. 6; 37 N. E. 580.

Jones vs. Angell, 95 Ind. 382.

Kelsey vs. Hay, 84 Ind. 89.

And having regard to the advanced state of the profession at the time of treatment:

Nelson vs. Harrington, 72 Wis. 591; 40 N. W. 228; 1 L. R. A. 719; 7 Am. St. Rep. 900.

Small vs. Howard, 128 Mass. 131; 35 Am. Rep. 363.

Almond vs. Nugent, 34 Ia. 300; 11 Am. Rep. 147.

Smothers vs. Hanks, 34 Ia. 286; 11 Am. Rep. 141.

Gates vs. Fleisher, 67 Wis. 504; 30 N. W. 674.

McCandless vs. McWha, 22 Pa. 261.

Tefft vs. Wilcox, 6 Kan. 62.

Hitchcock vs. Burgett, 28 Mich. 501.

This is further illustrated by the decision of the court in *Dunbould vs. Thompson*, 80 N. W. 325, where the court says:

"But we are of the opinion that the correct rule is that a physician and surgeon, when employed in his professional capacities, is required to exercise that degree of knowledge, skill and care which physicians and surgeons practicing in similar localities ordinarily possess."

From the foregoing decisions it is plain that the law holds him liable for an injury to his patient resulting from the want of requisite knowledge and skill, or the omission to exercise reasonable care, or the failure to use his best judgment.

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The rule in relation to learning and skill does not require the surgeon to possess that extraordinary learning and skill which belong to only a few men of rare endowments, but such as is possessed by the average members of the medical profession in good standing. Still he is bound to keep abreast of the times and a departure from approved methods in general use, if it injures the patient, will render him liable, however good his intentions may have been.

The court in the case of *English vs. Free*, a frequently cited case, says:

205 Pa. St. 624; 55 Atl. 777.

"A surgeon undertakes to possess and in the treatment of a case to employ such reasonable skill and diligence as is ordinarily exercised in his profession and in judging of the degree of skill, regard is to be had to the advanced state of the profession at the time." Citing

McCandless vs. McWha, 22 Pa. 261.

Burden of proof is on plaintiff to prove defendant failed to treat plaintiff with reasonable professional skill. Doctors testified it was hard to make the diagnosis.

There are many situations wherein it may be important to know whether the action is one in contract or in tort. An action in contract is founded upon a contract while an action in tort is for damages for breach of a duty owing to the person damaged; in the case of a physician and a patient, damages for negligence caused by breach of duty owed by the physician to his patient.

With relation to whether malpractice cases are based upon contract or a wrong the court in the case of *Gillette vs. Tucker*, 67 Ohio St. 106; 56 N. E. 685, says:

We believe that the situation is covered by Addison on Torts, 13, where it is said:

"A tort may be dependent upon or independent of contract. If a contract imposes a legal duty upon a person, the neglect of that duty is a tort founded upon contract; so that an action ex contractu for the breach of the contract or an action ex delicto

for the breach of the duty may be brought at the option of the plaintiff."

See *Staley vs. Jameson*, 46 Ind. 159; 15 Am. Rep. 285.

Therefore, if we call malpractice a tort in this case, it is a tort growing out of breach of contract which the law implies from the surgeon's employment and undertaking to perform the operation.

We have seen that it was a continuous obligation and recognized by the law and it was alive and binding so long as the relation of physician and patient subsisted. Divided Court, 3 and 3.

There is a dissenting opinion in the above case that the statute begins to run from date of tort and that tort is not continuing.

There is another duty owed by the physician to the patient and that is the duty of giving continued attention to the patient after he has once undertaken the case. He cannot for instance procure a case and then fail to give it his full attention. He must continue to see the patient and use his skill and knowledge to get the patient on the road to recovery. Not only this but if the practitioner decides to discontinue his attention the burden is on the practitioner to determine when those attentions may be safely discontinued. The court says in the case of *Gillette vs. Tucker*, 67 Ohio St. 106; 55 N. E. 685 on the question of Contract of Employment, "so continued attention to the undertakings so long as attention is required, in the absence of any stipulation to the contrary, is equally an inference of law and he is bound to use ordinary skill, not only in his attendance, but in determining when it may be safely and properly discontinued."

CHAPTER III.

SPECIALISTS

The relationship between the ordinary straight Chiropractor and his patient, together with the duty he owes to the public, was discussed in the last chapter. Now suppose that the Chiropractor holds himself out to the public and advertises as "Back-bone Specialist," "Baby Specialist" or "Diseases of Women Specialist," what duty does such a Chiropractor owe to the public and to his patient? What degree of skill will be required of him in a malpractice case? What degree of learning will be required should a patient sue him for malpractice? Will the standard of care, the standard of skill and the standard of learning be greater than that required of the Chiropractor who just holds himself out as a plain straight Chiropractor?

The Chiropractors who thus represent themselves to the public should know the duty the law places upon specialists and the risks of malpractice suits which they run when they so advertise. In order to determine these questions it is first necessary to find out what the courts think and say of specialists, for there have been cases where "M. D's" advertising as specialists have been sued for malpractice. The question of when is a specialist a specialist is answered in the Indiana case of *Baker vs. Hancock*, 64 N. E. 38.

In the case of *Baker vs. Hancock*, 63 N. E. 323; 29 Indiana, 456, the defendant was a physician who held himself out as a cancer specialist, and diagnosed the plaintiff's case as cancer of the nose, gave some local treatment which ate off the nose. The Court in speaking of the relationship between a specialist and his patient says: "When is a specialist a specialist? The question is

not one of law; it is a question of fact. The appellee may or may not have qualified himself as a specialist. Whether he had done so, was a matter within his own knowledge, and primarily for his own determination. Having arrived at the conclusion that he foreclosed such qualification it still remained optional with him as to whether he would hold himself out and receive and treat patients on the basis of it. When he determines to do this and does it, it then becomes his duty to exercise that degree of skill which he thereby represented himself as possessing. To relieve one practicing medicine under such circumstances of responsibilities commensurate with the pretensions under which patients are secured and compensation fixed, would be to give ignorant practitioners license to defraud and place innocent patients at their mercy. The definition of the noun "specialists" as given in the standard dictionary was followed in the opinion. It is said in that work to mean "more especially a physician or surgeon who applies himself to the study and practice of some particular branch of his profession. If so holding himself out, he undertook to diagnose and treat appellant's (patient) case as coming within the specialty so practiced by him, he was bound to use that degree of skill, which such practitioner of necessity should possess. It became his duty to give every patient to whom he undertook in that capacity to render the benefit of that reasonable skill enacted by the law from one thus engaged."

Baker vs. Hancock, 64 N. E. 38.

The writer takes the same view as the court in this respect. He does not pretend to say that a Chiropractor cannot advertise as specialist. That is the Chiropractor's business. When the Chiropractor has decided that he possesses the knowledge, learning and skill of a specialist, it still remains optional as to whether he would hold himself out as a specialist and receive patients on the basis of a specialist. But when a Chiropractor does hold himself out to the public as a specialist, then he must have the knowledge, learning and skill of a specialist and the failure to possess or use

either the knowledge or the learning or the skill of a specialist would be negligence.

Of course, the writer's opinion, if it is worth anything, would be to avoid the use of the word "specialist," because, as the writer believes, judgment for malpractice could easily be obtained under such circumstances.

In the first place the jury is ordinarily against the so-called "specialist". Those juries as a rule, are just ordinary men, generally of good common sense, who have seen in their life time a great many advertisements of so called "specialists" which these jury men knew or thought of as "quacks".

No, don't misunderstand, the ordinary man doesn't object to anyone being a specialist or to being expert in any one branch, but he rather thinks when one does advertise as a specialist, then that is "tooting one's own horn a little loud," and you can gamble he is going to require the so-called specialist to produce every bit of knowledge, learning and skill required by law, and this is the rub; if the so-called specialist didn't produce it, the jury would feel like giving damages, and giving good damages.

In regard to experts or specialists the court in *McClarín vs. Grenzfelder*, 147 Mo. App. 478; 126 S. W. 817, says in a case where defendant physician held himself out as a hernia specialist and injected paraffin, "because defendant held himself out as an expert in the treatment of hernia, the law required him to treat plaintiff with the skill and care commonly shown by physicians and surgeons in St. Louis and cities in advance or abreast of it in the practice of medicine and surgery, who devote special study to the treatment of the disease; that is to say, the proficiency and skill of hernia specialists, NOT MEANING BY THIS DESIGNATION ONLY PHYSICIANS WHO TREAT THIS DISEASE EXCLUSIVELY BUT ALSO THOSE WHO BY SPECIAL STUDY AND EXPERIENCE PROBABLY HAVE ACQUIRED MORE ACCURATE KNOWLEDGE OF THE RIGHT METHODS OF TREATMENT THAN THE GENERAL PRACTITIONERS."

5 *Thompson Negligence*, 6714.

McMurdock vs. Kimberlin, 23 Mo. App. 523.

Ram vs. Twichell, 82 Vt. 79; 71 Atl. 1045; 20 L. R. A. (N. S.) 1030.

From the foregoing it will be seen that the question of specialist is one for the jury. The jury first decides whether he held himself out as a specialist to his patients, and then they decide whether he really is a specialist. If they decide he really isn't a specialist it probably would mean that the jury was getting ready to go down into the practitioner's pocket and extract some money in the way of damages.

In the first place, a man may really be a specialist and not hold himself out as a specialist, in which case, if he were a Chiropractor, the relationship between himself and the patient remains the same as the ordinary Chiropractor.

Then a man who is a specialist may hold himself out and receive patients as a specialist and then immediately the relationship between the Chiropractor and the patient changes. He must then possess that degree of learning and skill which a specialist has, which means a considerable more than that possessed by the general practitioner. It is not sufficient to have the degree of learning of a specialist without the skill of a specialist and it is not sufficient to have the skill of a specialist without the learning of a specialist. He must possess both the degree of learning and skill—finally becoming employed as a specialist, it becomes his duty to exercise that degree of learning and skill of a specialist to accomplish the purpose for which he was employed, and do it in the same careful way that a specialist would do it. The specialist would, according to the case of *McClarín vs. Grenzfelder*, 147 Mo. App. 478, be required to have sufficient more learning, knowledge and skill than the general practitioner so as to qualify him in the eyes of the jury to be called an expert.

In the ordinary malpractice case against an M. D. it is hard to get other M. D.'s to testify against another M. D. but where the fellow has held himself out as a specialist or expert, the aver-

age M. D. will readily, freely and gladly testify against the so-called "specialist". I suppose this is because the average medical practitioner feels that the other fellow is taking an advantage by advertising as specialist, and gets his moment of revenge in a malpractice case. I suppose taken as a whole that the average Chiropractor has the same sensations and feelings as an M. D., and probably would do the same as the M. D. under the same circumstances.

It can be seen at once that the opportunities of malpractice against a specialist are greater than against any ordinary practitioner.

Further, there is the person who possesses neither the degree of learning nor the skill of a specialist, but because he wishes to attract patients by a false pretense of his learning and skill, advertises and receives patients as a specialist. This man is running grave risks of a large malpractice suit which would soon deplete any money gained through those means.

The same rule that applies to specialists also applies to Chiropractors who hold themselves out as obstetricians. For instance, it was called to the writer's attention that a graduate of a Chiropractic college went into Indiana, and openly advertised himself as an obstetrician. He also advertised that he had had one year training in obstetrics. When this man advertised himself as an obstetrician, with one year of training, he held himself out to the public as competent, which means that he held himself out as having the learning and skill for the purpose for which he was employed.

It is a question for the jury to decide under all the evidence, what is meant by "competent obstetrician." In such a case the allopath physician would probably get on the stand and testify about all the different kinds of knowledge and different kinds of skill that was required for one to be a "competent obstetrician." Now, if in fact that Chiropractor had only a very few hours in obstetrics, the jury might feel that the patient ought to be compensated, and would find that the man did not have the necessary

qualifications, the necessary knowledge and skill and that he was guilty of negligence. Of course, if the man did have the knowledge and skill of an M. D. or allopath physician, then, of course, the jury would find him not guilty and would not assess any damage against him.

From the foregoing brief of the law anyone who holds themselves out as a Chiropractor specialist must have more than the skill of the ordinary Chiropractor; indeed, he must have both the learning and skill of the specialist, and must use that learning and skill of the specialist for the purpose for which he was employed.

Also, when the Chiropractor advertises as a "diseases of Women Specialist" he tells the world that he has a vast fund of knowledge, learning and skill in the treatment of women's diseases.

It is one thing to hold out to the world that you have got all that skill and it is another thing to prove it before a jury, and if the jury should find upon examination that the Chiropractor really did not know much about all kinds of women's diseases they probably would be inclined to give a very large verdict for the plaintiff. The average lawyer can ask a hundred questions of the average "Diseases of Women Specialist" about the diseases of women which he could not answer and, for that matter, probably which nobody could answer, but all of which would tend to show the ignorance of the "Disease of Women Specialist" and the result would be an easy conviction.

The same is true of people advertising as "Baby Specialists".

The writer of this book does not say to any Chiropractor that he must not use the word "specialist" but he does think that if a person uses it, he should know the duties which he owes to the public, and the degree of care for which he is liable in a malpractice suit, and, if after knowing that, the Chiropractor still insists upon calling himself a "Specialist" without regard to these facts, he must then bear the burden of a possible very large judgment against him.

STATEMENT MADE AT TIME OF CONSULTATION

On a malpractice trial the plaintiff may testify to any of the conversations which were had with the practitioner, the signs on the door, signs on the window, advertisements on the wall. If this be true it is very important for the practitioner to be careful of his speech—careful of the words “cure” and “relieve”—careful to avoid any misrepresentation whatever.

“In an action against a physician for malpractice, evidence may be received as part of the *res gestae*, as to what was said and advised by the defendant in the course of a consultation in regard to the proper mode of treating the case on the occasion of the alleged improper treatment.”

Williams vs. Poppleton, 3 Or. 139.

To those Chiropractors who use adjuncts, attention is called to fact, if you advertise as a Chiropractor, and do something else, that fact may be established in court and the plaintiff at his choice may charge you with negligence as a Chiropractor or negligence as an allopath physician. You must hold yourself out for what you are and not something else.

“In an action for improper treatment of a knee, the admission in evidence, of a newspaper advertisement describing defendant’s specialty as ‘Eye and Nose’ was not error.”

A loose tongue is dangerous in any practitioner and loose and faulty statements to patients that they are “all right now” may be later used against you if such is not the case. Be conscientious, truthful and careful and remember that the so-called “bunk” has gotten many a physician into trouble.

In an action against a surgeon for alleged unskillful treatment of a fractured limb, whereby it was shortened, evidence of the statements of the defendant made in the plaintiff’s presence when the latter was discharged from treatment that it was “all right”, held admissible as part of the *res gestae*.

Piles vs. Hughes, 10 Ia. 579.

A further mention must be made at this time of the Chiropractors who use the prefix “Doctor” or “Dr.” Some Chiroprac-

tors use this with the word "Doctor" and some without. Some claim the right to use the prefix because it means learned in Chiropractic. Many, however, claim that the prefix "Dr." is used to imitate or ape the M. D. or allopath physician. It is to be hoped that they do not use it for the purpose of gaining patients or their confidence. If they do they run grave risks.

There are in the world many ignorant men and women who imagine the word "Doctor" or "Dr." means an allopathic physician or surgeon who prescribes drugs and medicines. If such a person were to come to the office of a Chiropractor with "Doctor" on the front of it and would employ the Chiropractor under the misunderstanding, that the Chiropractor was an allopathic physician and surgeon, then the Chiropractor would be bound to possess and use the same degree of learning and skill possessed by an allopathic physician. Inasmuch as they differ widely in learning and skill, the Chiropractor could not qualify and a conviction of malpractice would be simple and certain.

If any of you readers use the word "Doctor" or the prefix "Dr.", understand that the patient may testify on the stand that you used the term "Doctor" and that he supposed by that term, that you were a regular all around Doctor, or allopathic physician. Such evidence supported by the evidence of your advertisements, would carry the case to the jury, who, if they felt sorry for the patient or hostile to yourself, might render you liable in damages.

It may be added here that there are two acts which make a jury furious, like a bull seeing a red flag; one is a lie and the other is deception.

Even the answer that such a title means only "learned" and that the title of "Doctor of Chiropractic" was conferred on you at your school does not change the matter. In the eyes of the jury a doctor is a doctor. For instance, one Chiropractor tried to explain that he used "Dr." in front of his name because he had a degree of Doctor of Philosophy. How far would that get with a jury? If your science is superior to allopathic medicine, then make your science distinctive. Call yourself a Chiropractor,

not "Doctor." When your friends and patients call you "Doctor" that is an opening to correct them and show them the difference between Chiropractic and allopath medicine. At one blow sell your science and make your science *distinctive*.

It has been the general consensus of opinion that the use of the letters "D. C." in the rear of the name, or "Doctor of Chiropractic", does not render the Chiropractor liable for any greater degree of skill than that used by the ordinary Chiropractor. But the case may be very much different where the term "Doctor" or "Dr." is placed before the name, such as Dr. H. B. Jones. The patient may easily swear in such a case that he understood Dr. H. B. Jones was an allopathic physician, whereas it would be very difficult to swear that H. B. Jones, D. C., or H. B. Jones, Doctor of Chiropractic, was an allopathic physician.

The writer has been recently advised of a Chiropractor in a state who used the word "Dr." in front of his name, such as "Dr. H. B. Jones", and when he sued a patient for the price of the adjustments, the judge charged the jury that if he represented himself as a person practicing medicine and surgery by the use of the prefix "Dr.", then he could not recover. The jury found for the patient.

The following extract is taken from a Wisconsin case:

"Evidence that a person who undertook the management of a broken leg was called as a surgeon, and attended the case seven weeks as such, was called "doctor" during his attendance, and consulted with other surgeons, has a tendency to show that such person held himself out as a surgeon as alleged in the declaration, and should not be withheld from the jury for that purpose."

Reynolds vs. Graves, 3 Wis. 416.

The Wisconsin Statutes prohibit the use of the word "Doctor" or "Dr." unless the practitioner is registered or licensed under the Board. Chiropractors are not licensed under the Board.

The following letter of F. G. Lundy, Secretary of the Wisconsin Chiropractic Association, to Dr. J. M. Dodd, Secretary of the State Board of Medical Examiners, is so clear and concise

and states the position of the Chiropractor so squarely that it is reproduced in its entirety.

"Marshfield, Wis., October, 10.

Dr. J. M. Dodd, Sec'y,
State Board of Medical Examiners,
Ashland, Wis.

Dear Doctor :

This office is in receipt of a letter from your office, in your official capacity as secretary of the State Board of Medical Examiners.

I assume this to be a stereotyped letter sent me as a matter of information, in my official capacity as secretary of the Wisconsin Chiropractic Association.

You and I agree on the fundamentals, but from a very different view-point. My opinion on the subject has been sought many times by Chiropractors in Wisconsin, in fact so many times that two or three years ago I published and distributed to the Chiropractors of the state a bulletin in which I stated that we were not interested in either our rights or theirs; that the word "Chiropractor" was distinctive, and in fact so distinctive that it lent distinct individuality to the individual wearing it on his stationery, signs, and any other matter that comes under the public eye; that the public should be educated through the constant observation of that one word, to the exclusion of all other titles, prefixes, affixes or any combination thereof, that they might be able to differentiate and realize that the word "Chiropractor" meant something different than the commonly understood term "Dr." or "Doctor"; that the term had become so commonplace that there was no means of determining whether a man was a horse doctor, a medic, regular or irregular, dentist, masseur, or any other probable hybrid; that the term was common to a now common herd of people; leaving the public unable to discern what they were entitled to be informed on, by visualization and without question.

We have always held that the word "Chiropractor" was an asset to the Chiropractor, if consistently and persistently used by him; that the usage of any other title was not only valueless, but conferred no special honor upon him. Frequently we find Chiropractors who seemingly like to ape the commonplace, thinking they acquire prestige—in this respect they really suffer from a hallucination, because they P. T. Barnum themselves only.

The above frankly expresses my position, and while frankness may be my weakness, I aim to be thoroughly and correctly understood. It has never been clear to the writer why your profession exercised such zealous and jealous interest in the term "Dr." or "Doctor", because to you and your profession it is as much a misnomer as it is to me and mine. To a physician, to a surgeon, it is in my estimation meaningless, and were I a member of your American Medical Association, about the first thing I should do would be to introduce a resolution abolishing the term or title in so far as the profession was concerned; a physician would be known as such, a surgeon likewise. On the other hand I am wondering who ever ordained the medical profession to take unto themselves the right to say who and who might not be entitled to the usage of the title "Dr." or "Doctor." May I inquire, Doctor, from what source the title M. D. was conferred upon you? Did not the medical school from which you graduated in medicine confer upon you that title? If your answer be in the affirmative, can the State of Wisconsin, by any act of legislation deprive you of that which you earned as a student of medicine? Has your profession any right, legal, moral, or otherwise, or does it come within the province of your Board to determine who shall or shall not wear the title "Doctor of Divinity," or is it within your further province to say whether they shall use that title conferred upon them by a theological institution—and what would be your position if the ministry decided that it was their exclusive right to its usage and not yours—a position which if it can be at all justified really should be theirs and not yours.

Anything, Doctor, emanating from my pen or dictated by me is set forth under the caption F. G. Lundy, Chiropractor. That is what I am, nothing more, nothing less. As such I desire to be known. I am neither flattered nor honored when addressed as "Dr." or "Doctor". Frequently the public makes the error of addressing me by that term, occasionally the press makes the same error. The frequency of the error, however, does not add to our prestige, nor tickle our vanity and any act of legislation dealing with the subject would not enhance our ability in the rendering of Chiropractic health service to an over sick public, neither would it alter our viewpoint on the subject.

You and your Board have been seeking legal opinion on the subject, on different occasions, without any direct result to your satisfaction, I venture to say. It may be, Doctor, that you are not as practical a fellow as I am—opinions to me mean little—and all you seem to have gained so far is free publicity. This seeming infraction of law and transgression on your exclusive rights, Doctor, if the tables were turned, you being the Chiropractor and I the Doctor of Medicine, with an apparently sound statute behind me, it seems to me I should endeavor to settle it to my own satisfaction. Obviously, if you are observing and sincere in the matter, it should be comparatively easy to select a subject somewhere in the state, to settle the matter. Were I in your place nothing short of a U. S. Supreme Court ruling would suffice.

If your premise should be sustained by that august body you would then have afforded me great professional satisfaction, and you would have terminated by a fitting climax what I have long contended for on the public platform in Chiropractic circles throughout the United States. If on the other hand you were not sustained, the same satisfaction would be mine in having purged the medical boards of this country of some of the arrogance they display, and more particularly YOUR Board.

Verbost on matters of this character are but empty phrases, while friendly enemies as you and I might settle the question beyond the shadow of doubt, then, too, the associated press would

afford both of us much free publicity, you as the prosecutor, I as the defendant.

Most sincerely yours,

F. G. LUNDY, Chiropractor.

We come now to the class of Chiropractors who hang out an advertisement telling the public that they are graduates of a certain school, for instance, the Palmer School of Chiropractic. Another advertises that he uses the methods of a certain school, for instance, "Palmer methods." This may be done by means of a sign or a printed advertisement. In either case, the relation between the Chiropractor and the patient assumes a different angle. When a patient is attracted to that office by those advertisements, the Chiropractor then holds himself out to the public as possessing that degree of learning, together with the skill that is possessed by the graduates of the Palmer School of Chiropractic in similar localities, and further, that when he is employed, he will use that learning and skill to accomplish the purpose for which he was employed, and when employed, it becomes his duty to use reasonable care and diligence in the exercise of his skill and learning. Thus, if a Chiropractor advertises that he is a graduate of the Palmer School of Chiropractic, or any other school, or uses "Palmer methods" and the Chiropractor does not possess either the learning or skill of the graduates of that school, he is guilty of negligence. And if the Chiropractors advertising to use "Palmer methods" do not use the Palmer methods, they are guilty of negligence. All of this refers to the consequences of advertising, and there comes a further consequence which follows: If a Chiropractor is employed by a patient because he says he is a graduate of the Palmer School of Chiropractic, or any other school, or because he uses the "Palmer methods" and the Chiropractor be not a graduate of the Palmer School or of the school he advertises himself as being a graduate of, or does not use the "Palmer methods," he is guilty of deception and the lack of knowledge or skill or the use thereof, would be negligence.

If the Chiropractor advertises using "Palmer methods," and should use some other method, which is contrary to or not approved by the "Palmer method," and an injury should result, the Chiropractor would be guilty of malpractice, and this is so because by advertising as the user of "Palmer methods," the Chiropractor holds himself out to the public as possessing a degree of skill of practitioners who use that method, and further, that he will use that method when employed. This rule in malpractice is important, and reference thereto is not made to disparage any other school or to prevent anyone from using "Palmer methods," but it does advise those that advertise that they are using "Palmer methods," that they must use "Palmer methods."

The "Palmer methods" are methods which have been developed by D. D. Palmer and B. J. Palmer, and are used in the Palmer School of Chiropractic, and there are some schools that advertise that they teach "Palmer methods," but some of which, from the writer's observation, do not teach "Palmer methods," and the responsibility then lies upon the Chiropractor to find out which of them do in reality teach "Palmer methods," because when he is on trial for malpractice it doesn't make any difference what he thought the school taught; the question is, what did the school teach and what Chiropractic learning and skill he possesses and how he used it. And if he went to a school that advertised that it was teaching "Palmer methods" and didn't teach "Palmer methods," even though the Chiropractor thought he was using "Palmer methods," he would be negligent unless he did use "Palmer methods"; that is, provided he advertised using "Palmer methods."

It must always be borne in mind that the Chiropractor may make a special contract which may either raise or lower the degree of learning and skill which he must possess. Of course, the most common of these is where the professional man contracts that he has more skill and learning and that he will use more skill and learning for the purpose for which he was employed than

ordinary, and if the Chiropractor so contracts, he will be held to the greater skill and learning.

The patient may prove these facts by the advertisements of the Chiropractor and it is best to word all advertisements carefully so as not to hold yourself out as possessing more learning and skill than you are willing to be liable for.

This is especially true of advertisements or conversations which guarantee cures. A separate chapter is devoted to the consideration of this.

It has been stated that a Chiropractor may lower the degree of learning and skill which he should possess and use but an explanation should be made in that connection.

The last recent case on that point is where a student veterinary surgeon told his employer that he lacked experience and skill in the service of the things he was asked to perform and asked no pay for his services. The court held that the practitioner was in that case not charged with liability.

The extract from that case is as follows:

"A practicing physician who informs a person employing him that he lacks experience or skill in the service he is asked to perform is charged with no liability on account of his professional incompetency."

Morris vs. Altig, 138 N. W. 510; 157 Iowa, 265; reversing judgment on rehearing 134 N. W. 529.

However, there has been another rule announced in the case of *Nelson vs. Harrington*, 72 Wis., which the writer thinks would be more likely to be applied. It is as follows:

Perhaps a medical practitioner may protect himself from liability for unskillfulness by a special contract with his patient that he shall not be so liable; but in the absence of such a contract the practitioner must be held to his common law liability. This rule was applied to a common carrier in *Conkey vs. C. M. & St. P. R. Co.*, 31 Wis. 619; Dixon C. J. there said: "I think in the absence of special contract or agreement to the contrary, the true policy of the law now, as much as ever, and even more, is to

adhere to the strict rules of liability on the part of common carriers established by the Common Law." Page 633. The reasons which there prevailed for adhering to that rule and thus vindicating a sound public policy, are much more cogent in the case of the physician who deals with health and life instead of property.

ADVERTISEMENTS

One of the advertisements which the writer saw in one of the telephone books of a large city was the following:

Expert Chiropractic and Optometric Service
to better your health and eyes. Eyes examined
and faulty eyesight corrected. Dr. B. D. Jones,
Opt. D., D. C.

added to which was more advertising.

Under such an ad the following argument would probably be made to the jury:

That this practitioner inserted this advertisement to attract patients. That he held himself out as an expert Chiropractor. That he held himself out as an optometrist. That he held himself out as a doctor to attract patients.

These tactics would, of course, put the practitioner on the defensive and he would try to explain that he put "Dr." in front of his name because he was a Doctor of Optometry and a Doctor of Chiropractic and that Doctor merely means learned. He would then have to explain what he meant by expert.

The patient suing for malpractice would then be given a chance to tell what he understood by the term "Doctor" and the term "expert." After that the practitioner would have to prove himself an expert Chiropractor. An expert Chiropractor means a Chiropractor with such a large amount of learning and such a great degree of skill in the Art, Science and Philosophy that he can be classed as an expert.

The writer knows of no legal objection to a practitioner calling one's self "expert" except that when called upon to defend a

malpractice suit the attorney for the plaintiff would require him to step right up to the line and qualify as an expert. If the practitioner could qualify, all well and good. If he could not qualify the attorney for the patient would never stop talking about it.

Another advertisement along the same lines is as follows:

"D. B. Jones—Former Professor in Palmer
School. Graduate of Indiana University.

"If learning, experience, equipment and results
mean anything to you make an appointment."

If you, Mr. Reader, were to read that advertisement, what would be your impression of that practitioner's ability? Would your impression be that "He must be about the best you had ever heard of"?

Of course, it is not the writer's province to criticize such an advertisement but merely to state that in event of a malpractice suit he would have to set a very high standard before a jury to come up to his advertisement, and if he be successful the jury would probably acquit, and if he failed the jury would probably convict.

This is the common type of advertisement which would be especially hard to justify before a jury:

May Hirt, D. C. Ph. C. M. C.

Specialist

Diseases of Women and Children

Goitre, Neuritis, Rheumatism cured by Electricity.

In the writer's opinion an advertisement to the public along these lines would play an important part in the conviction of the practitioner for malpractice, and probably no competent attorney would overlook the opportunity. Part of the cross examination might run like this:

Prosecution: "You published this advertisement?"

Answer: "Yes."

Prosecutor: "And you intended the public to read it?"

Answer: "Yes."

Prosecutor: "And you intended the public to think you were a specialist in Women's and Children's Diseases?"

Answer: "Yes."

Prosecutor: "And by that advertisement you intended that the public understand you were better and more qualified than the ordinary Chiropractor?"

Answer: Not printed.

Then would follow a quiz on Chiropractic by the answers of which the jury would judge whether or not the defendant was a specialist.

Here is another one:

Phone Main 3364

DR. GUSTAV BECKER

Chiropractor

Nerve and Spine Specialist

5 No. LaSalle St., Rooms 611 and 613

Monday, Wednesday and Friday, Hours 10 A. M. to 7 P. M.

Tuesday, Thursday and Saturdays, 10 A. M. to 5 P. M.

This man says he is a doctor. What does that mean? What might the jury construe it to mean? He also says he is a Chiropractor. He also says he is a nerve specialist. He also says he is a spine specialist. If the evidence on the trial showed him to be a poor Chiropractor would you on the jury be inclined to stick him or turn him loose?

CHAPTER IV.

CONTRACTS TO CURE

One of the worst mistakes that any practitioner of any school can make is to advise his patient either by advertisement or conversation that he will cure the patient.

The practitioner can legally expressly contract with his patient to cure him of his ailment. The consideration for the contract may be either the employment of the practitioner by the patient, or it may be the payment of a fee or any other valid consideration.

Ordinarily the practitioner is not supposed to warrant or guarantee a cure. The reason for this ruling by the court is that the science of medicine and surgery has so long been uncertain and inexact and that such a large percentage of failures have been recorded on the part of the medical profession that to hold that a physician, by accepting the contract of employment, guarantees or warrants a cure would be to render every physician liable to malpractice, maybe, without his fault and would inevitably bankrupt the practitioners, for it is common knowledge a large amount of every practitioner's practice is incurable in the strict sense of the word. Some may be relieved in different degrees, but after all man is mortal. As a little English Sergeant while going over the top yelled to his faltering comrades: "Come on, do you want to live forever?"

Another and perhaps the best reason why the physician does not warrant or guarantee a cure is because the liability of the practitioner begins with and is based upon the representation or promises of the practitioner at the time of employment. As has been seen in the preceding chapters, the ordinary practitioner represents only that he possesses a reasonable degree of learning and skill and that he will use that learning and skill when employed for the purpose for which he was employed. It will be

seen by this that the ordinary practitioner does not warrant or guarantee a cure, but only represents that he possesses and will use a reasonable degree of learning and skill, etc., for the purpose for which he was employed.

The real good Chiropractor sells his patient the philosophy of Chiropractic and explains thoroughly how nature cures, how all he does is to eliminate the cause, etc., and when the patient thoroughly understands the idea and the philosophy of Chiropractic, he doesn't need any "promise to cure" in order to make him take adjustments. But there are many Chiropractors who are either lazy or don't know how to sell the philosophy of Chiropractic, and who say to the patient, "If you give me three months, I will get you well," or the statement, "It will take six months to cure you." In fact, one Chiropractor went so far as to say to a man who had lumbago, "You lie down here with it, and when I get through with this adjustment, you will get up without it." Now all of you Chiropractors who are acquainted with adjusting patients with lumbago know that in many cases the patient may feel a little bit worse after the first adjustment than he did before, although he will get good after-effects from the adjustment. And that is exactly what happened in this case. These Chiropractors who tell their patients how long it takes to cure them, or that they will cure them, do that solely to procure patients and that is wrong, and they let themselves open to a malpractice suit which may cost them a lot of money.

But this does not mean that the Chiropractor may not guarantee or warrant a cure if they are so foolish. Indeed many Chiropractors are careless about their advertisements and their personal conversations about cures.

For instance, advertisements which state "I will cure you of hay fever," and in response thereto a patient consults the Chiropractor, who repeats the words of the advertisement, then it becomes a question for the jury to decide whether it constituted a special contract to cure.

Every Chiropractor and every other practitioner should know how careful he should be in regard to this. The patients who are looking for hope, or who are chronic and have tried everything have their minds focused on a cure, and many of them may honestly believe the Chiropractor or practitioner actually promised a cure. The vast majority of these patients do not remember the exact words of the conversation but acquire convenient memories and swear on the witness stand, that the practitioner promised that he would cure them.

This situation is very dangerous for the Chiropractor, because it now becomes a question for the jury, who, if they are favorable to the patient, may find a large verdict against the practitioner. Any situation like this becomes a gamble, which no one with property would wish to take. The great trouble is that the patient testifies that the practitioner promised to cure him and relies on the practitioner's advertisements to color or justify this claim. The only sure way for the Chiropractor is to avoid all language in his advertisements which even hint that he "contracts a cure," or that "he will cure," or that "he can cure."

That a great many Chiropractors advertise in this way is due most probably to the faith they have in their science, but it is very poor business. The real method of avoiding this situation is to master and sell the Art, Science and Philosophy of Chiropractic so thoroughly to the patients and prospective patients that they understand the science and that there is no "promise to cure."

The worst danger about promising a cure is the amount of damages in case of failure. For instance, it is said that if a man promise another to cure him and fails, the damages for the breach of contract is the difference to the patient between being cured and the way he is left by the practitioner.

A contract to cure becomes a binding contract between the parties when, acting upon a valid consideration, the practitioner makes his promise to cure.

This contract is fulfilled when the practitioner has cured the patient. If there is a dispute between the patient and the practi-

tioner as to whether there is a cure, then the only body which can settle the question is a jury. This is not recommended.

The contract is breached when the practitioner after the time limited in the contract has failed to cure. If the practitioner agreed to cure the patient within six months then if there has been no cure at the end of six months, the contract is breached.

Or, if no time is specified, the contract is breached, if the practitioner fails to cure within a reasonable time. As to what is a "reasonable time," is also a question for the jury, which is not recommended.

The last warning advice to all Chiropractors should be, "No matter how much you believe in your science or how confident that you can benefit your patient, do not make the mistake of promising your patient something which you may not be able to fulfill, probably because of causes beyond your control. The only excuse for such a promise is that the Chiropractor wishes to procure the patient, feeling confident he can benefit the patient. However, that should not be considered. You don't need patients that bad and if you explain the Art, Science and Philosophy of Chiropractic clearly enough to your patient he will sell himself, and upon his recovery, you as a Chiropractor and Chiropractic as a science, will get the credit.

The pitfalls into which the mixer may fall by bad advertising or promising to cure is very well illustrated by the case of *Gill vs. Schneider* in 48 Colo. 382, 110 Pac. 62. In this case the defendant was an "Electro Biologist" and the patient sought damages for breach of an alleged contract to cure her, claiming that the promise to cure was absolute. Evidence was introduced to substantiate this claim of receipts of payment by the plaintiff to the defendant, written on the back of cards on the reverse side of which was the defendant's name, followed by the words: "The Electro Biologist can cure any and all chronic diseases." This was admissible as tending to corroborate the plaintiff's claim that the promise was absolute.

It will be noticed, that all of the above advertisement has all

the earmarks of a fakir advertising himself by a fake advertisement. Many of the Chiropractors in the field, knowing that their science accomplishes many wonderful things, are prone to be extravagant in their advertising claims in which they sometimes state directly that "they can cure diabetes" or some other disease.

From the above case cited they can see the risk they run from such advertising. There is a great difference between such advertisements and the advertisements of those who have studied carefully Chiropractic philosophy, for the latter teaches the patient the art, science and philosophy of Chiropractic which each patient can apply to his own ailment. The advertiser, to be safe, must be careful in his statements both as applies to himself and his profession.

It is said in these cases that the promise must be absolute. What is meant by that, is a real definite promise that the practitioner will cure, as distinguished from an obligation to cure, raised or implied from the law or the facts.

"An allegation in the declaration in an action for misconduct in setting a fractured bone that defendant promised to perfect a cure can only be sustained by positive proof of an express promise as the law does not raise by implication such an undertaking also."

Grindle vs. Rush, 7 Ohio (Han) 123 Pt. 2.

Vanhooser vs. Berghoff, 90 Mo. 487, in 35 S. W. 72.

"The contract of a surgeon is not one of warranty that a cure will be effected but only that he possesses and will use reasonable skill and diligence in performing the service, but it is competent for a surgeon to make a contract expressly binding himself to make a cure."

It will be seen from the above citations that a physician or surgeon or any practitioner may make a contract to cure, but the reader will also observe it is a very hazardous contract.

The question can be asked, "What would be the effect of contracting to cure an incurable disease?" In the case of *Lubbs vs. Hilgert*, 120 N. Y. S. 387, 135 App. Div. 227, the court says:

"When the undisputed evidence shows that the tubercular disease of plaintiff's hip joint has progressed so as to be considered incurable before defendant undertook its treatment, the defendant cannot be held liable for failure to effect a cure although he represented that he could do so." This, undoubtedly, is the law following the law of contracts with reference to people contracting to do the impossible. Such contracts the court will relieve the parties from the burden thereof. But the practical difficulty is of much greater danger because the question immediately arises, "When is a disease incurable?" Who can say? There are many different degrees of curability. It may become a question of fact for the jury. Therefore the writer's advice is still to make no contracts to cure. A contract to cure an incurable disease is manifestly fraudulent and a contract to cure a curable disease is manifestly bad policy.

CHAPTER V.

LIABILITY FOR DIAGNOSIS

LIABILITY RESULTING FROM PRACTITIONER DIAG- NOSING OR HOLDING HIMSELF OUT AS DIAG- NOSING FROM THE ALLOPATHIC THEORY

WE NOW TURN TO WHAT IS THE MOST DANGEROUS TO ALL PRACTITIONERS, ESPECIALLY TO CHIROPRACTORS, AND THAT IS THE SUBJECT OF SPECIAL CONTRACTS, OR CONTRACTS TO DO SOMETHING IN ADDITION TO CHIROPRACTIC WHEREBY THE PRACTITIONER BURDENS HIMSELF WITH ADDITIONAL LIABILITIES.

By "special contracts" means a special contract made at the time of employment in a professional capacity in addition to the Chiropractic liability. That contract may arise in different ways. First, there may be a direct conversation or writing between the practitioner and the patient. Second, there may be such a holding out by the practitioner that such a contract is implied by law.

This will be clearly indicated and explained in taking up the different contracts.

First, the ordinary practitioner may make a contract to diagnose a patient's ailment by direct conversation; for example, a case which has happened follows. A man went to a practitioner supposed to be a Chiropractor, and said to him, "I want to determine whether I have a sexual disease, and, if so, what," and the practitioner said he would examine him and take a test of his urine for laboratory purposes, which was done. A few days later the patient was informed that he did not have a sexual disease, whereupon the patient told his wife of the finding of the practitioner, and the wife and his patient had sexual intercourse, the

wife contracted the venereal disease; the husband in reality did have a venereal disease at the time of examination, and the wife brought a malpractice suit against the practitioner for \$25,000.00.

It is apparent to all that the practitioner in this case made a contract to diagnose. But the practitioner went much further than that, perhaps further than he thought himself, for he also by that same contract held himself out as having or possessing the reasonable degree of learning and also the reasonable degree of skill of a Chiropractor, and further than that, for he further in law represented that he will use that learning and skill carefully for the purposes for which he was employed, that is, to ascertain the presence of any venereal disease in the patient.

But the practitioner's representation and consequent liability goes further than that. Allopathic diagnosis is defined as the act or process of discriminating between diseases and distinguishing them by their characteristic signs and symptoms; hence, a summary of symptoms with the conclusion arrived at therefrom, a determination of the distinctive nature of a disease. Standard Dict.

The reader will appreciate that diseases are but names for conditions of the body, and the peculiar thing about it is that those names used are medical terms most frequently coined by members of the allopathic school. So it is equally apparent that diagnosis from the allopathic theory is a question of fact expressed in medical terms. In effect that is what such a diagnostician agrees to do—that he will determine from the allopathic standpoint what is wrong as expressed in medical terms.

So the fact of whether the patient had a venereal disease was something which the practitioner had to ascertain. He, therefore, held himself out as possessing a reasonable degree of learning and skill as is ordinarily possessed by other professional men who ascertain the presence of venereal disease, in other words, allopathic physicians.

Thus the practitioner in this case made a special contract whereby he represented he possessed and would use the reasonable

degree of learning and skill as is ordinarily possessed by allopathic physicians of the same or similar localities.

The practitioner in this case having failed to ascertain the presence of a venereal disease and his wife being injured thereby, is liable in damages. Needless to say and properly so, the jury should assess large damages.

The practice on the part of a large number of Chiropractors to use urinalysis is not only a great danger to themselves, but possibly a detriment to the profession.

The writer has had called to his attention a number of different laboratories which make examinations of urine and he has been informed that a number of Chiropractors send urine specimens to some of these laboratories, which report back that they find albumen or sugar, or that the case has diabetes or Bright's disease, etc.

Six specimens of the urine of the same person were sent at the same time to the same laboratory, under different names, and six varying and different reports came back, which illustrates either one of two things, either that the laboratory did not examine the urine at all, or else that it didn't know how to examine urine.

Now, for the benefit of those who do not know anything about the examination of urine, the writer who has had an opportunity of examining several physicians on the stand regarding it, will state that the examination of urine seems to be one of the simplest things that the physician does, and still when properly done, is quite complicated, and in the writer's opinion comparatively few of the physicians and surgeons in the country know how to examine urine correctly for all the different conditions thereof and to ascertain the nature and kinds of foreign substances therein.

It is true that most of them think they know, but when they are brought right down to brass tacks, on cross-examination, they will admit that they don't know.

Of course, if one of these urine analysis laboratories, or if one of the Chiropractors who makes it a practice of analyzing urine, does know tested and approved methods of examining urine, then, of course, he may proceed safely to do it. But if he makes a mistake, he is going to have the physicians on the stand testify that he didn't know anything about it and that he didn't possess the knowledge and skill of the allopathic physician, in which case the jury would probably hold him negligent.

The writer's personal observation is that urinalysis is about as dangerous a thing as a Chiropractor can do. If some allopathic physician wanted to frame up a case on you, he could get some of the urine, doctor it up, make a different analysis and try to swear your analysis out of court. The danger is that the urine analyses are very often different, which would form a reasonable basis for the M. D.'s testifying that you were wrong.

The worst danger of urinalysis from a malpractice standpoint is that it is impossible to tell from the urinalysis where the subluxated vertebrae and resultant nerve impingement is, and as a result urinalysis is entirely outside of the Art, Science and Philosophy of Chiropractic. It then becomes a question for the jury whether the urinalysis was for the purpose of making a diagnosis from the Chiropractic standpoint or from the allopathic theory. If they should decide it was according to the allopathic standpoint, then the practitioner would be bound to possess and use the care, skill, knowledge and diligence of the allopathic practitioner.

The writer strongly recommends that urinalysis be left to the profession which begot it—the allopathic physician.

The same criticism may be applied to practitioners who take the temperature or the pulse or use the stethoscope. Consider the attorney for the plaintiff cross-examining the Chiropractor who uses the thermometer, stethoscope or takes the pulse. His first question would be, "You claim to practice only Chiropractic?" Ans. "Yes." Q. Can you tell which vertebra is out of alignment by the amount of temperature in the ordinary chemical thermometer? If so what vertebrae is out of alignment when the ther-

mometer reads 105? What vertebrae is out when the thermometer reads 103? What vertebra is out when the pulse is 56 beats to the minute? What nerve is impinged when the pulse is 118? What did you hear when you applied the stethoscope? From what you heard, what vertebra did the stethoscope say was subluxated?

The practitioner is left with a choice of two evils—either he did use the stethoscope, etc., to make a medical diagnosis or he used it as a bluff, trying to impress the patient with his knowledge. One way he becomes a fakir, the other way he becomes responsible as an allopathic physician. Neither course is recommended.

Then, as stated before, it becomes a question for the jury whether the practitioner was within the Chiropractic theory or in the allopathic realm. Their decision determines what kind of care, knowledge and diligence will be required of the practitioner.

Anything, of course, which enables the Chiropractor to determine what vertebra is subluxated, or what nerve impinged, such as palpation, X-Ray, nerve tracing or any other means which may become known to the profession, is within the Chiropractic realm.

The moment that the Chiropractor or anyone else undertakes to ascertain what is wrong as expressed in allopathic terms or theory, then the practitioner must use the same learning and skill of an M. D. to ascertain what is wrong, and failing to use that learning and skill is negligence. This is dangerous, for it is apparent that the M. D. and the Chiropractor have a different learning, because they approach the subject of disease from a different angle. Another angle is to be considered—which is that the names of diseases are always given in the language of the M. D., such as gastritis, gall stones, etc.

The proposition is very simple—that if a practitioner holds himself out to diagnose in an allopathic way then he must conform to allopathic medical standards and diagnose in the regular allopathic medical method.

Now, the practitioner may assume the risk of the regular allopathic medical standard by his advertisements. If the practitioner advertises that he can and will diagnose ailments in such a way as to lead the patient to believe that he will diagnose diseases in the regular medical way, then the practitioner will be held to the care of the regular physician. An example of this kind of advertising is as follows:

John Jones, D. C. Chiropractor
will diagnose your disease correctly

or

John Jones, Chiropractor,
Diagnoses Diseases.

The same is true of the Chiropractor using thermometer, stethoscope and pulse. The patient may testify that because the practitioner used the stethoscope that he supposed the practitioner diagnosed the same way and used the same methods as the allopathic physician. This leaves the question to the jury, which is not recommended.

Inasmuch as the medical records show that about fifty per cent of the medical diagnoses are wrong, using medical terminology and nomenclature, it is easy to see that Chiropractors, although able to accurately tell the vertebrae subluxated, may be unable to affix the correct latin term to the symptoms or effect—and bear this in mind in your Chiropractic work, that if you attempt to tell a patient what is wrong from a regular medical stand-point and fail, then you are negligent unless you can prove that you possessed and used that degree of learning and skill possessed and used by the ordinary allopathic physician in the same or similar localities. It is well known allopathic physicians and Chiropractors are not friends and because of prejudice there would be testimony in plenty from the allopathic M. D. that although you may be a good Chiropractor, that as an allopathic M. D. you are a frost, a fraud and an ignoramus.

The following extract is taken from Butler's "Differential Diagnosis in Medicine," in order to give the practitioner some idea of what diagnosis from the allopathic theory means.

DIAGNOSIS

"DIAGNOSIS. This, in its narrowest sense, consists in bestowing a name upon a certain assemblage of pathological phenomena. It should include also a knowledge of the causal factors of the disease; a determination of its character with reference to type and severity; an estimate of the amount and kind of damage, both general and local, which has been sustained by the organism; a forecast of the probable course and duration of the morbid process; and a cognizance of the personal characteristics of the patient, whether psychic or physical, inherited or acquired. Its final object is to be able to treat disease intelligently, and the application of scientific methods to the completest discrimination and recognition of disease constitutes the art of diagnosis.

A diagnosis is made by means of symptoms, which constitute the evidence upon which is based a judgment as to the nature of the case. Symptoms, the phenomena caused by morbid processes, are divided into subjective, those which can be appreciated only by the patient, and objective, comprising those which are detected by the personal examination made by the physician. The term "physical signs" is by common consent applied to the objective symptoms revealed by special methods of examination, used mainly in determining the condition of the organs contained in the chest and abdomen.

In addition to a knowledge of the symptoms, subjective or objective, which may exist at the time of examination, it is necessary to ascertain the presence or absence of hereditary taints or tendencies, to know something about the habits and occupation of the patient, to learn of past illnesses or injuries, and to obtain a clear idea of the manner of onset and subsequent evolution of the present disease. Finally, it is well to study the temperament

and personal characteristics, mainly psychical, of the individual patient so far as practicable.

The family and personal history, the history of the present illness, and the results of the examination constitute the evidence upon which the final judgment as to the nature of the case is to be based. A necessarily heterogeneous collection of facts must be classified with reference to their relative value and significance and compared with the previous knowledge and experience of the diagnostician, after which a judgment may be rendered as nearly as possible in accordance with the facts. This constitutes the second and final step in the making of a diagnosis. The process is thus seen to consist of two elements—observation, in its broadest sense, and reasoning, applied to the results of the observation.

Certain terms of some practical value and convenience are used to qualify a diagnosis, as follows (the definitions are largely from Foster) :

**List of Descriptive Terms Employed With Reference to
Diagnosis, Symptoms and Signs**

DIAGNOSES:

1. Anatomical.—Based on a knowledge not only of symptoms of phenomena, but also of definite anatomical alterations on which the phenomena depend ; or a post-mortem diagnosis.

2. Clinical.—Based upon the symptoms manifested during life.

3. By exclusion.—Reached by a deductive process, all the affections which present salient points of similarity with the one to be diagnosticated being reviewed in turn and each successively discarded as one or more of its essential features are missed in a given case, until but one possibility remains, which is accepted as the true one.

4. Differential. The process of distinguishing between different diseases which resemble one another more or less closely.

5. Direct.—The symptoms are of such a nature that they point to the presence of one special disease, and are not capable of misinterpretation.

6. Pathological.—Of the nature of a lesion, without regard to its situation.

7. Physical.—By means of physical (objective) signs, irrespective of subjective symptoms, as by palpation, auscultation, etc.

8. Presumptive.—Not regarded as certain.

9. Retrospective.—Of some antecedent disease or injury, the nature of which can be deduced only from the history given and from the persistent effects.

10. Symptomatic.—Consisting simply in the determination of the most striking symptoms.

11. Topographical.—Of the seat of a lesion.

Symptoms:

1. Constitutional.—Those that may result from unbalancing of the organism as a whole, and are common to affections of many kinds.

2. Direct.—Those that depend directly upon the disease.

3. General.—Constitutional. (See above.)

4. Indirect.—Which are the indirect consequences of the disease.

5. Local.—Which result from localized disease, and are usually confined to the site of the diseased organ or tissue.

6. Negatively Pathognomic.—Which seldom or never occur in a certain disease, and consequently, if present, show that the case is not one of that disease.

7. Pathognomic.—Which undeniably indicate the existence of a certain disease.

8. Reflex.—Which are caused by local disease, but manifest themselves by means of the nervous system in an otherwise unrelated organ or part of the body.

9. Sympathetic.—Which appear with the essential ones, but for the presence of which no cause can be assigned except that of sympathy.

Signs:

1. Physical.—Already defined.
2. Rational.—Signs and symptoms, subjective or objective, corresponding to the alterations in structure and mechanical conditions discovered by physical examination.
3. Stethoscopic.—Those discovered by auscultation.

Difficulties in Diagnosis. For various reasons it may be difficult or impossible to make a diagnosis. The most important of these reasons are as follows:

(1) The subjective symptoms may be puzzling or incongruous.

(2) The objective symptoms and signs may be ill-defined, obscure, or, if present, as discovered later, may be impossible of detection by the most searching examination—e. g., a beginning, small perinephritic abscess in an unusually obese patient, which cannot be palpated until it reaches a certain size.

(3) Certain symptoms essential to a diagnosis may not appear until the disease has advanced to a certain state—e. g., the splenic enlargement and rose rash of typhoid fever.

(4) Several diseases, each of which in other cases may constitute the sole morbid process, may co-exist, one as the primary or main disease, the others attending as complications or sequelae. One or more of the secondary lesions may be recognized, and the underlying or primary disease or condition be overlooked—e. g., pleurisy with effusion occurring as a result of previously unrecognized pulmonary tuberculosis, and masking the primary lesion in the lungs.

(5) The rarity of a disease may lead to its non-recognition because of unfamiliarity with its history and symptomatology, and perhaps the consequent failure to elicit all the diagnostic data.

(6) The lack of a full and accurate history is at times a serious hindrance in making a diagnosis. The patient may be deaf and dumb or speak an unfamiliar tongue, or he may be unconscious, delirious, mentally unsound, or so ignorant and stupid that no reliable information can be obtained from him, and intelligent friends or relatives may not be available. On the other hand, in consequence of a variety of motives, essential facts may be concealed by the patient or the friends.

(7) Drug symptoms, unless known and due allowance made for them, may so disguise, add to, or simulate certain diseases that the diagnosis may be shrouded in uncertainty.

(8) The diagnostician must be a good observer, and at the same time be able to reason correctly. As Huxley well says: "Scientific reasoning differs from ordinary reasoning in just the same way as scientific observation and experiment differ from ordinary observation and experiment—that is to say, it strives to be accurate; and it is just as hard to reason accurately as it is to observe accurately. In scientific reasoning general rules are collected from the observation of many particular cases; and, when these general rules are established, conclusions are deducted from them, just as in everyday life. If a boy says that 'marbles are hard,' he has drawn a conclusion as to marbles in general from the marbles he happens to have seen and felt, and has reasoned in that mode which is technically termed induction. If he declines to try to break a marble with his teeth, it is because he consciously, or unconsciously, performs the converse operation of deduction from the general rule 'Marbles are too hard to break with one's teeth.' . . . The man of science, in fact, simply uses with scrupulous exactness the methods which we all, habitually and at every moment, use carelessly."

While medicine is to a certain extent a science, and requires scientific modes of reasoning, medical art is, in a large proportion of cases, obliged to reason from probabilities as premises, and its final results can not be expressed in the exact formulae of the mathematician. In obedience to some law which we do not yet

know, 2 and 2 do not always make 4 in the reactions of the human body, otherwise patients would not be encountered who present serious symptoms after a medicinal dose of morphine, or blaze out with urticaria after eating strawberries.

To study and to compare; to approach a case with a mind open to impressions, and without preconceived or fixed ideas as to its nature, based upon previous hearsay; to review and balance the evidence from time to time in the course of the disease; to question one's self, "Is there any other disease or condition which may better explain these symptoms than that which I have already assigned?"—these and other habits of thought make the difference between the man who sees without learning and he who learns by seeing.

OBTAINING EVIDENCE

The diagnostician acquires the facts upon which he is to form an opinion: (1) by Interrogation—inquiry of the patient or his friends; (2) by Observation—an examination, mainly objective, of the patient. Information obtained by interrogation is called the History or Anamnesis (remembrance); that derived from observation, the Present Condition or Status Praesens.

From a purely scientific and diagnostic point of view, the first questions addressed to the patient will be with reference to his ancestry; next, in regard to his personal history antecedent to the present disease; then as to the existing disease, followed by a careful and systematic examination, first of the general conditions, then of special organs, one by one, together with such chemical, microscopical, bacteriological, and other investigations as appear to be demanded. But for obvious reasons this order of pursuing the investigation is for the most part impracticable, and consumes an unnecessary amount of time.

In the vast majority of cases the facts are acquired by the physician in the reverse order. The first question asked is, "In what way do you feel ill?" "Of what are you complaining?" Or, the patient will volunteer a statement as to his subjective sensations. The question or the statement will direct attention at once

to the probable or possible seat or nature of the disease. Further inquiries are put as to the duration and character of the morbid sensations. During these interrogations the physician attentively scrutinizes the general aspect of the patient in search of obvious objective symptoms. The pulse, respiration and temperature are taken. The organ or part which appears to be most at fault is first examined, after which due attention is paid to other portions of the body. Finally, the family and social history may be ascertained.

This is the logical order of investigation, as conditioned by actual circumstances. It is a matter of indifference as to the sequence in which the symptoms are learned, provided that the examination is sufficiently intelligent and systematic to be sure of eliciting all the facts, and that the facts when obtained are so arranged in the mind of the physician that they form a clear and coherent picture, and are capable of being recorded in an orderly manner. It is to be remembered in this connection that in many cases it is just as necessary to note negative facts—i. e., the absence of certain symptoms or signs—as it is to ascertain the presence of others.

KEEPING CASE HISTORIES

This habit promotes accuracy of observation, completeness in examination, and affords trustworthy material. The physician who keeps adequate records requires facility in describing symptoms, signs and morbid conditions. The drawbacks are the time consumed and the amount of work involved, but by late methods the time and labor required are reduced to a minimum. To accomplish this requires certain materials and accessories."

Now after carefully considering the manner and method of the allopath physician in making a diagnosis, are you willing to meet that standard? You may say all physicians and surgeons do not diagnose that carefully but on the witness stand against a Chiropractor for malpractice don't you think they would swear that the above method was their method of diagnosis?

If, however, you have any doubts on the question consider this case. A Chiropractor has diagnosed the patient's case as sclerosis of the liver, whereas the physicians said it was Addison's disease and the patient brought a malpractice suit against the Chiropractor for negligently making a false diagnosis.

The following questions might be put to you.

Examination of Chiropractor who was sued for malpractice for failing to diagnose correctly from an allopathic standpoint.

Q. You diagnosed the patient's case as sclerosis of the liver?

A. Yes.

Q. What objective symptom did you find?

Q. What was the temperature?

Q. What was the pulse.

Q. What was the respiration?

Q. What was the blood pressure?

Q. What was the urinalysis?

Q. What was the condition of the tongue?

Q. What was the condition of the skin?

Q. What was the character of the feces?

Q. Did you test the reflexes?

Q. What was the heart and lung action as heard through a stethoscope?

Q. Did you ascertain the occupation of the patient?

Q. Did you ascertain from the patient how much alcoholic liquor he used?

Q. Did you ascertain whether he used drugs?

Q. Did you ascertain whether he used tobacco and how much?

Q. Did you ascertain what his father died of?

Q. Did you ascertain what his mother died of?

Q. Did you ascertain what previous illnesses the patient had?

Q. Did you ascertain the length and character of those illnesses?

Q. When you arrived at the diagnosis of the patient's ailment did you arrive at that conclusion by the chemical method of diagnosis?

Q. Did you arrive at your conclusion by the exclusive method of diagnosis?

Q. Did you arrive at your conclusions by the direct method of examination.

Q. What was the character of the sclerosis?

Q. What was your determination as to the type?

Q. What was your determination as to the severity?

Q. What was your estimate of the amount and kind of damage generally?

Q. What was your estimate of the amount and kind of damage locally?

Q. What was your forecast of the probable cause and duration of the morbid process?

Your answers would be considered by the jury in the light of determining whether you were careful in diagnosis, whether you had the learning of the physician in making a diagnosis, whether you had the skill of the physician in making the diagnosis and whether you used the learning and skill of the physician in making the diagnosis.

Personally I don't feel I would like to take the risk.

Another special contract which may be entered into between the practitioner and the patient is as follows:—

Some Chiropractors (but very few) wish to be regular M. D.'s and solely for the purpose of putting M. D. behind their name pursue a course of study, get a license and put up a sign or advertisement as follows:

John Jones, M. D., Chiropractor.

Other M. D.'s who become convinced of the merits of the

Chiropractic theory of disease or because they have failed to make a success in the medical field, also hang up a sign:

John Jones, M. D.—Chiropractor.

Of these two men suppose one will practice Chiropractic "only". He will think that by using the M. D. sign that he may attract a few new patients. Also suppose that the other will try to practice the two sciences together, Chiropractic and Allopathic medicine. It is the opinion of the author that both of these men hold themselves out as possessing and using such a reasonable degree of learning and skill as is ordinarily possessed by both Chiropractors and allopathic physicians in the same or similar localities. If these men do not possess the learning and skill of both and use it and injury results through negligence, these men are liable for malpractice.

Doubtless there are very few who would wish to undertake such a liability, because if an M. D. leaves the regular profession, they have no use for him, and if the man is a fakir and mixing Chiropractic, medicine and double-jointed advertising all together, the Chiropractors have no use for him, and testimony as to his unfitness could be easily obtained. The old maxim, "Jack of all trades, master of none," seems well fitted to this situation.

The following case shows that in case of wrong diagnosis the practitioner is only required to use ordinary care, but by special contract the practitioner may contract otherwise.

Dye vs. Corbin, 59 W. Va. 266, 53 S. E. 147.

In this case the plaintiff broke his leg, head of femur being broken off. Defendant diagnosed and treated it as a dislocation. Plaintiff had to have leg amputated and on stand testified to wrong diagnosis. Supreme Court held his evidence insufficient to show negligence. On p. 149.

"We think it may be said to be the generally accepted doctrine that a physician is not required to exercise the highest degree of skill and diligence possible in the treatment of an injury of disease unless he has by special contract agreed to do so.

In the absence of special contract he is only required to exercise such reasonable and ordinary skill and diligence as are ordinarily possessed and exercised by the average of the members of the profession in good standing in similar localities and in the same line of practice, regard being had to the state of medical science at the time."

Failure on the part of a physician to effect a cure does not alone establish or raise a presumption of want of skill or negligence on his part.

Wohlert vs. Seibert, 23 Pa. Sup. Ct. 213.

Haire vs. Reese, 7 Phila. 138.

Pettigrew vs. Lewis, 46 Kan. 78; 26 Pac. 458.

Barney vs. Pinkham, 29 Neb. 350; 45 N. W. 694.

A great many Chiropractors have called attention to the fact that many states require death certificates which state the nature of disease in allopathic nomenclature. It can readily be seen that failure to make a correct diagnosis from the allopathic standpoint does no particular damage to the deceased, provided the diagnosis was not made for the purpose of treatment.

Therefore the following advice would be given that in cases where the law requires a diagnosis from the medical standpoint that the Chiropractor write on the certificate: "This diagnosis from an allopathic standpoint made for the purpose of this certificate only."

There is a vast difference between diagnosing or finding out what is wrong with the patient for the purpose of eliminating the cause and for the other purpose of making out a death certificate, or other certificate required by law.

However, the safest way is to stay off the question of allopathic diagnosis entirely even though the Chiropractor may have a license to do that act and instead of diagnosing the case with allopathic nomenclature, let the coroner do it and let him assume all risk of mistaken diagnosis.

The state laws of quarantine and reporting contagious diseases must be observed to avoid malpractice cases, but that could be

done in the following manner. Upon the appearance of suspicious symptoms, refuse to make a diagnosis from the allopathic standpoint, but to require the city or county health physicians to do the diagnosing.

Please do not get mixed on the legal idea of diagnosis. According to law every practitioner must make a diagnosis, or in plain words find out what is wrong with the patient or the cause of the disease so that the practitioner may apply the proper remedy. The practitioner finds out the cause of disease according to his particular theory of disease.

Previous to the discovery of the Art, Science and Philosophy of Chiropractic the allopathic method of diagnosis was practically the only one used, and there was with the exception of Christian Science but one theory or theories of disease, and although allopathic methods of treatment differed, the theory and method of finding out what was wrong was practically the same.

Upon the discovery of the Art, Science and Philosophy of Chiropractic, the world was endowed with a new method of finding out what is the cause of disease, which is entirely different and separate from the allopathic or any other method.

If you stick to that method then you are liable only for using the learning and skill of the ordinary Chiropractor in determining the position and nature of the subluxated vertebrae, etc. However, when you get over into the allopathic method and theory of determining what is wrong then you are liable as an allopathic physician. This is illustrated by the most recent of malpractice cases, *Kuechler vs. Volgman*.

In this case the complaint alleged that the defendant had treated the patient according to the methods of Chiropractic. When the case came to trial, the Court gave judgment to the defendant Chiropractor without hearing any evidence because as the Lower Court said, "All you charge is that the defendant treated this patient according to the methods used by Chiropractors and that is all he was supposed to do. So you have not charged negligence."

But in this same complaint the plaintiff stated that the defendant Chiropractor negligently diagnosed the ailment of the patient. The practitioner may be negligent either in treating or in diagnosis.

Thus the plaintiff, the patient, appealed from the decision of the lower court to the Supreme Court, which held that the defendant was not charged with negligent treating because the complaint stated he treated according to the methods used by Chiropractors but that the complaint did say the Chiropractor negligently diagnosed and for that reason the lower court should have heard evidence on that issue.

The Court then says Chiropractic is one of the schools of medicine (meaning thereby of the healing art) and that that Chiropractor defendant should be tried according to the theory and method of his own school.

The opinion in full is as follows:

No. 41.

State of Wisconsin, In Supreme Court

Herman F. Kuechler, Appellant, vs. Frank C. Volgmann, Respondent.

Appeal from an order of the circuit court for Kenosha county: E. B. Belden, Circuit Judge. Reversed.

Action for malpractice. The material allegations of the complaint are as follows: "That the above named defendant is a chiropractor, so called, practicing his profession in the City of Kenosha, in said County and State. That at the time hereinafter mentioned he has held himself out to the public as capable of treating persons afflicted with disease, and bodily ailments and holding out, representing and advertising to relieve and cure persons so afflicted without the use of medicines or drugs, and by a form or method peculiar to the class of practitioners to which the defendant belongs, and who are known to the public as chiropractors.

That on or about the 28 day of September, 1918, the above named plaintiff was afflicted with and suffering from such dis-

orders of bodily functions as to cause him to believe in the necessity of consulting and conferring with some person of the required learning, skill and experience to alleviate, relieve and cure such affliction of which he was suffering.

That on or about said day he consulted the above named defendant who was then practicing his said profession at the City of Kenosha, and employed the said defendant as such chiropractor to relieve and cure him of such disease or malady from which he then suffered for compensation to be paid therefor, and for that purpose the said defendant undertook as a chiropractor to attend and care for the plaintiff.

That the said defendant then entered upon such employment and either through lack of care, want of understanding, or knowledge of the symptoms of well known disease did not use due and proper care or skill in endeavoring to cure plaintiff of the disease or malady of which he was suffering, and negligently undertook the treatment of said plaintiff upon misapprehension that the said plaintiff was suffering from some derangement of the stomach with resulting nervousness and headache, of which the said plaintiff then suffered. That at said time the said plaintiff was afflicted with and suffering from a tumor which was growing in his head, and which was the cause of such derangement of bodily function.

That the said defendant for compensation paid to him from time to time by the plaintiff continued to treat the plaintiff according to the methods used by members of defendant's profession for a period of eight months, during which time the said defendant failed to either relieve or alleviate the suffering of said plaintiff, but the pain and suffering of said plaintiff continued to grow worse and worse and disorders of his body became more aggravated under such treatment, whereupon the defendant advised the plaintiff to go west for relief on or about the 21st day of May, 1919.

That while in the west the defendant continued to fail in health and the pain and suffering continued to increase, and his

headaches and dizziness of which he continually suffered became more severe and finally he became at times blind.

That on or about the 8th day of August, 1919, he returned to Kenosha, Wisconsin, and on the 10th day of September, 1919, he went to the Augustana Hospital in the City of Chicago, for treatment, and there his malady was immediately diagnosed by a physician and surgeon of skill and experience as a tumor growing within the head, which had been for a long time, and then was, irritating the brain, and it became necessary to operate upon the said plaintiff and in order to save the life of plaintiff it was necessary to remove a large portion of the skull of plaintiff in order to relieve the intra cranial pressure resulting from the growth of such tumor.

That this plaintiff is informed and believes that if the said defendant had possessed ordinary skill or ability in the treating of disease he would by the exercise of ordinary care have known that the said defendant was suffering from the effect of a tumor growing in his head, and by the exercise of ordinary care would have known that the methods adopted by him to relieve said plaintiff were useless and only aggravated his suffering and affliction.

Plaintiff further alleges, and he is informed and believes, that if the said defendant had used ordinary care and skill in diagnosing the affliction of the plaintiff he would have known by the use of such ordinary care that the said plaintiff was afflicted with tumor and that an operation upon the plaintiff at the time when the plaintiff first consulted the said defendant would have effected an immediate and permanent cure.

That because of the long time which the said tumor was allowed to grow under the treatment of the said defendant it became impossible for surgeons of acknowledged skill and ability to remove such tumor from the head, but the only relief which could be accorded to the plaintiff was the operation hereinbefore alleged.

That by reason of the defendant's negligence and unskilled examination and treatment of said plaintiff, the said plaintiff was

made sick, and kept from attending to his business ever since about the 8th day of September, 1918, suffered much pain and was put to great expense, and has been, and still is disabled from attending to his labor and business, to the damage of the plaintiff, Twenty-five thousand (\$25,000) dollars."

The defendant entered a demurrer ore tenus which the court sustained. From an order entered accordingly the plaintiff appealed.

Vinje, C. J. The trial court sustained the demurrer on the ground that the complaint having alleged that defendant treated the plaintiff according to the methods used by members of defendant's profession, namely by chiropractors, it negatived negligence and lack of skill, since the rule is that a physician is required to exercise only that degree of care, diligence, judgment and skill which other physicians of good standing of the same school or system of practice usually exercise in the same or similar localities under like or similar circumstances having due regard to the advanced state of the medical profession at the time in question, citing, *Nelson vs. Harrington*, 72 Wis. 591; *Wurdemann vs. Barnes*, 92 Wis. 206; *Marchand vs. Bellin*, 158 Wis. 184; *Hrubas vs. Faber*, 163 Wis. 89; *Jaeger vs. Stratton*, 176 N. W. 61. Such is undoubtedly the rule of law in this state, and were the complaint grounded upon a lack of skill, care, or of negligence, in treatment only, the trial court came to the right conclusion. But we construe the gravamen of the complaint to charge a lack of skill and care in diagnosis, in the failure of defendant to discover the nature of the ailment from which plaintiff suffered. Malpractice may consist in a lack of skill or care in diagnosis as well as in treatment. *Jaeger vs. Stratton*, 176 N. W. 61. A woman may be in the early stages of pregnancy. A doctor may diagnose it as an ovarian tumor and operate. There may be no lack of skill or care in the operation, but there may be in the diagnosis.

It is a familiar principle that a complaint must be liberally construed in favor of the pleader. By examining the complaint set out in the statement of facts it will be found that the pleader

says that through a lack of skill and care the defendant negligently undertook to treat plaintiff for a malady from which he was not suffering, and that had the defendant possessed ordinary skill or ability in treating disease he would by the exercise of ordinary care have known the true cause of his ailment. The complaint also alleges that plaintiff "is informed and believes that if the said defendant had used ordinary care and skill in diagnosing the affliction of the plaintiff he would have known by the use of such ordinary care that the said plaintiff was afflicted with tumor and that an operation upon the plaintiff at the time when the plaintiff first consulted the defendant would have effected an immediate and permanent cure." This expressly charges lack of care and skill in diagnosis with resultant damages.

That chiropractors, who by the provisions of Sec. 1435c Stats. 1921 are permitted to practice without a license in this state, are required to exercise care and skill in diagnosis, if they undertake to diagnose, there can be no doubt Sec. 1435i directly so provides and makes them liable for malpractice. So far as here applicable it reads: "Any person practicing medicine, surgery, osteopathy, or any form or system of treating the afflicted without having a license or a certificate of registration authorizing him so to do, shall not be exempted from, but shall be liable to all the penalties and liabilities for malpractice; and ignorance on the part of any such person shall not lessen such liability for failing to perform or for negligently or unskillfully performing or attempting to perform any duty assumed, and which is ordinarily performed by licensed medical or osteopathic physicians, or practitioners of any other form or system of treating the afflicted." It is clear from the allegations of the complaint that defendant undertook to diagnose as well as to treat the disease. Diagnosis is ordinarily assumed and performed by licensed medical or osteopathic physicians. But it may be assumed by others, and it is held that the practice of chiropractic is the practice of medicine. *Commonwealth vs. Zimmerman*, 221 Mass. 184; *State vs. Barnes*, 112 S. E. 62. And the fact that chiropractors abstain from the

use of words like *diagnosis*, *treatment* or *disease* is immaterial. What they hold themselves out to do and what they do is to treat disease and the substitution of words like *analysis*, *palpation* and *adjustment* does not change the nature of their act. *Commonwealth vs. Zimmerman*, 221 Mass. 184 and cases cited on page 189. Hence when the defendant assumed to perform that duty he must exercise the care and skill in so doing that is usually exercised by a recognized school of the medical profession. *Nelson vs. Harrington*, 72 Wis. 591. This the complaint alleges he failed to do and the demurrer admits the allegation. For these reasons we reach the conclusion that the trial court erred in sustaining the demurrer.

BY THE COURT: Order reversed and cause remanded with directions to overrule the demurrer and for further proceedings according to law.

The case went back to the lower Court and on the trial the writer, who was attorney for the defendant, presented his view of it to the Court which accepted it and presented this question to the jury: Did the defendant fail to exercise that care, skill, diligence and judgment in diagnosing the plaintiff's ailment as is usually exercised by practitioners of the same school of medicine in the same or similar communities under the same or similar circumstances, due regard being had to the advanced state of the science of the time?

The jury answered that the Chiropractor was not negligent and the case ended.

Unless, therefore, the practitioner wishes to be tried according to the standard of the allopath physician, he must first prove that he belongs to a separate school of medicine. The practitioner can do that who is a Chiropractor, the homeopath can do it. They have a complete theory of disease, methods of ascertaining the cause, which theory is capable of being bounded as to what it includes and what it does not include.

Take the case of the "sulphur bath expert", sued for malpractice. The Court would have to decide this question: Does

the giving of sulphur baths constitute a separate theory of disease with means or methods of ascertaining that disease and applying a remedy therefor, or, on the other hand is sulphur baths only one of the many remedies used and applied by regular M. D.'s and if so, could it be considered as a separate school or part of allopathic medicine and surgery?

The same question would have to be decided by the courts with reference to violet rays or X rays or any other rays. Is there anything peculiar or different in the practitioner of violet rays with respect to his theory of disease, the ascertainment thereof and the remedy therefor, such as to justify calling it a separate school of medicine or, on the other hand is it only one of the many remedies which have been and may be used on occasion by the Allopathic physician?

If the Court should decide that violet ray should be raised to the dignity of a separate school of medicine, then you would be tried according to the standard of learning and skill of the ordinary violet ray artist or X ray artist.

On the other hand, if the Court decided violet ray should not be raised to the dignity of a profession but that it is only one of the many remedies sometimes prescribed and used by regular M. D.'s then you would be tried for malpractice according to standard of the allopath physician and surgeon. This is because the rule is that where the practitioner cannot prove he is practicing according to the methods of a separate school, he must be responsible and tried by the standards and methods of the allopathic school of medicine.

In the case of

Henslin vs. Wheaton, 97 N. W. 882; 91 Minn. 219.

The Court makes the distinction between the use of the X ray for taking pictures and for the purpose of a remedial agent. This case is further discussed in the chapter on X ray.

In the event that the practitioner attempted to justify the use of sulphur baths, salt baths, vapor baths, violet rays, X rays, official surgery, dietetics, presenting of salts, on the ground that it

was part of Chiropractic, the attorney for the plaintiff could meet that assertion by some of the following questions:

Describe the manner in which a sulphur bath will adjust one of the articulations of the spine.

What is the theory of Chiropractic with respect to the nine functions of the body?

If Chiropractic is correct why do you use sulphur baths?

If sulphur baths are correct, why use Chiropractic?

Describe the manner in which violet ray remedial treatments adjusts a subluxated vertebrae to its normal alignment?

If Chiropractic is correct why do you use violet rays?

If violet rays are correct why do you use Chiropractic?

As a matter of fact, "Doctor", you haven't got much faith in either Chiropractic or violet ray,—you just sell it.

Do you use violet ray indiscriminately on everybody for anything or do you only use your violet ray for some diseases?

How do you determine when to use it and when not to use it?

Many other questions could be asked which would be very embarrassing.

CHAPTER VI.

LIABILITY FROM MIXING OTHER SCIENCES WITH CHIROPRACTIC

The most common special contract is that contract made by the mixers. A mixer is a practitioner who in his practice mixes Chiropractic and parts of allopathic medicine in varying degrees. Some use a very small part of Chiropractic, some only using the name and a large part of allopathic medicine, including massage, medicine, baths, dietetics and orificial surgery, while others use a large part of Chiropractic and only a small part of allopathic medicine.

Of course, the fundamentals of the Art, Science and Philosophy of Chiropractic and the theory of allopathic medicine are diametrically opposed to each other; and it may be difficult to conceive how they can conscientiously practice two opposite systems at the same time, but they do.

When the writer uses the word "mixer", he uses it because the word concretely sets forth what that class of practitioners do who mix two diametrically opposed sciences, and without intention of saying anything derogatory to any person or class, although the writer is at a loss to understand their reasoning. The writer instead takes pleasure in showing a mixer the advantages of using Chiropractic adjustments solely. If the mixers understood correctly the Art, Science and Philosophy of Chiropractic and reasoned the matter out correctly they would see the financial advantage to themselves and the professional advantage to the Science of using Chiropractic adjustments solely.

Some advertise as follows:

John Jones, Chiropractor		
Goitre Cured by Electricity		
Sulphur Baths		Massage
Violet Rays	Vibrator	Dietician

Now that advertisement represents this, not only that John Jones possesses and will use the learning and skill of an ordinary Chiropractor but makes the further representation that John Jones possesses and will use that degree of learning and skill of an allopathic physician.

And the reason is this: the rule is that John Jones represents that he possesses and will use the learning and skill of an ordinary practitioner of the same school. But the courts say, that in order to have a school it must be a recognized school with rules and principles of practice which all of its members profess to follow.

For instance, the courts say Chiropractic is a school of healing but that magnetic healing is not.

Chiropractic is a recognized school of healing with its own Art, Science and Philosophy of disease, which is separate and distinct from the theory of disease of the allopathic physician. It is as a theory complete unto itself and capable of being bounded and identified.

Outside and not part of Chiropractic Art, Science and Philosophy are sulphur baths, massage, violet rays, dietetics, X rays used for performing cures or relieving ailments. But the regular M. D.'s have known of and used sulphur baths, massage, violet rays, dietetics, X ray, cupping or blood letting long before the mixer and they still use it. But no court yet has held that sulphur baths is a separate school of healing, which has rules of principles and practice for the guidance of all its members as respects principles, diagnosis and remedies—and in the opinion of the author no court will so hold. The same may be said as to violet rays, X ray, massage, dietetics and orificial surgery. What the courts will probably hold is that sulphur baths, massage, violet rays, die-

tetics have been and are used now by the regular M. D.'s and that they are all part of the regular allopathic school.

In discussing X ray it must be remembered that the X ray may be used for two distinct purposes: first, for taking pictures; second, for treating some disease or ailment of the patient.

If a practitioner use the X ray for determining the location of the various vertebrae that would be squarely within the Chiropractic Art, Science and Philosophy, but on the other hand if a practitioner use the X ray for treating some disease or ailment that would be squarely within the allopathic theory, and the practitioner would be liable as an allopathic physician.

Henslin vs. Wheaton, 91 Minn. 219; 97 N. W. 882.

For further explanation see the chapter on X ray.

Or, deciding that there is no school and having to require some standard of care, the court will probably require the same degree of care and knowledge and skill as the allopathic physician. This is illustrated by the extract from the case of *Nelson vs. Harrington*, 72 Wis. 591, which is reproduced at length in this book. (See index).

Another case which should be read by the mixer is the case of *Longan vs. Wettmer*, 64 L. R. A. 973, 180 Miss. 322.

In this case the defendant was a magnetic healer. "Defendants contend that, as plaintiff's action is based solely upon the negligent treatment of her, in order to constitute unskillfulness it devolved upon her to show that the kind and manner of treatment adopted was not proper or usual in magnetic healing, and that, as she failed to do so, she was not entitled to recover. If this action was being prosecuted upon the theory that defendants were physicians, or that magnetic healing was one of the recognized professions, there would be more force in this position, but it is not, but upon the ground that they held themselves out as magnetic healers, claiming and pretending to heal and cure all mental and physical ailments and disease of the human mind and body through some power which they possessed peculiar to themselves. Nor was it necessary, in order to sustain their liability for injuries

sustained by plaintiff, that they should have been, or claimed to be, practicing physicians; but if they undertook to cure plaintiff of her maladies, and by the negligent or unskillful treatment of her either by themselves or their employees, and by reason of such treatment she sustained the injuries sued for, she was entitled to recover just the same as she would be entitled to recover damages for the negligent or unskillful performance of any other kind of contract.

It is a legal truism that any person who is legally responsible for his conduct is liable for all damages suffered by another which are the proximate result of negligence, carelessness or want of ordinary care; and the reasons which prevail in such cases are much more cogent in the case of a person who deals with health and life, instead of property.

In the case of *Nelson vs. Harrington*, 72 Wis. 591, 1 L. R. A. 719, 7 Am. St. Rep. 900, 40 N. W. 228, it is said: "One who holds himself out as a healer of diseases, and accepts employment as such, must be held to the duty of reasonable skill in the exercise of his vocation. Failing in this, he must be held liable for any damages proximately caused by unskillful treatment of his patient. This is simply applying the rule of liability to which all persons are subject who hold themselves out, and accept employment as experts in any profession, art or trade. The theory upon which an expert practices his profession, art or trade, the sources from whence he derived his knowledge of it, the tools and appliances he employs in the exercise of his calling, his methods of work, are not controlling considerations. The courts pass no judgment upon these matters, they look only to results. Thus a person may rely entirely upon his genius or normal intuitions for some line of mechanical work, and hold himself out as an expert, and accept employment therein, without previous training or practice. The law holds him responsible if he does this work so unskillfully, although he does the best he can. He takes the risk of the quality or accuracy of his genius or intuitions. On the same principle one who holds himself out as a medical expert, and ac-

cepts employment as a healer of disease, but who relies exclusively for diagnosis and remedies upon some occult influence exerted upon him, or some mental intuition received by him when in an abnormal condition, in like manner takes the risk of the quality or accuracy of such influence or intuition. If these move him so imperfectly or inaccurately that although he pursues the course of treatment thus pointed out or indicated to him, he fails to treat the patient with reasonable skill, he is liable for the consequences. The only difference in the two cases is, the mechanic acts under normal, and the physician acts under abnormal, influence or intuitions. The law does not concern itself with the quality of the mechanic's genius, or with the reality or nature of such alleged occult influence or intuition which controls the physician in his treatment of his patient. It only takes cognizance of the question, "Did the practitioner or expert render the service he undertook in a reasonably skilful manner?" That question, as applied to the defendants, the jury, upon sufficient proofs have answered in the negative. While it is true that the physicians who testified on the part of plaintiff did not claim or pretend to know anything about the practice of magnetic healing, they were nevertheless competent, from education and experience, to testify whether the treatment which plaintiff underwent was proper in any case, and especially in her condition. Simply because a person claims or pretends to possess certain powers of healing peculiar to himself is no reason why other persons, who do not claim such powers, but who know from education and practice, are not competent to judge whether the treatment administered was negligently or carelessly done. Otherwise any nonprofessional person might undertake to treat a certain disorder, and—if defendant's position be correct in law, it matters not how carelessly or negligently performed—because, forsooth, no one could be found of the same pretensions to testify with respect to such treatment, the injured person would be without remedy. The contention is, we think, untenable.

A number of physicians were introduced as experts on behalf of plaintiff, and among them Dr. Halley, of Kansas City.

He testified as follows:

Q. Where did you meet her?

A. Nevada, Missouri.

Q. State to the jury whether or not you made an examination of that lady on the 14th of September, 1899, and, if so, what you found as a result of your examination.

A. I examined her in Nevada and found some bruises, some contusions on her back down near the hips, extending up from the hips over the small of the back, some marks, the effusion of blood underneath the skin and into the tissues, close down over the median line. There was a small black spot still, the result of blood effused under the skin and into the tissues underneath. I found that part of the back very painful to pressure; also that she manifested pain on bending the body,—bending the limbs forward or backward; that on making a pressure over the discolored parts I found her suffering with pains in the knees and ankles and wrists and shoulders. She had some uterine trouble as well, but these were the principal things she complained of when I examined her.

Q. Describe to the jury, if you will, what peculiar parts of the back were injured?

A. Well, it was the lower part of the small of the back and the upper part of the hips, extending from about the middle line of the hips up to the middle or small of the back; and spots were perhaps 5 inches in length, and 2, or 2½ inches in width.

Q. How are the hipbone and backbone or sacrum there joined together?

A. They are joined by a tough, dense and tolerably hard substance called fibro-cartilage; it is the fibrous tissue with cartilage cells in it, which makes it very stiff and very strong.

Q. State to the jury if you know, whether or not those ligaments or that cartilage were in any way affected by this injury.

A. On the left side the attachment of the sacrum to the hipbone was probably torn and the vertebrae or ligament of the vertebrae were also torn.

Q. The backbone?

A. That is, the lower spine between the first or second and third lumbar vertebra were evidently injured.

Q. State to the jury in what way the rupture or tearing of those ligaments would make itself manifest on the surface.

A. By black and blue places, and by the effusion of blood, the blood being extravasated.

Q. "Extravasated" means thrown out toward the surface?

A. Yes sir; the blood vessels were torn, and the bleeding was into the tissues.

Q. State whether or not you have since that time examined this lady, and, if so, when and where.

A. I examined her this morning there at the hotel.

Q. Well, state to the jury what you found with reference to injuries now on her back or spine.

A. Well, I find that she is still suffering pain over the part where the black spot was when I examined her last September; that is, at the point where the hipbone joins the sacrum on the left side.

Q. That is, the backbone, the sacrum is—

A. A part of the backbone; yes sir.

Q. Doctor, I will ask you this hypothetical question. Suppose that a lady twenty-five or twenty-six years of age has suffered a spell of malarial fever in Porto Rico, of about two months' duration, in which she was confined to her bed during that time, returned to this state in a weak, debilitated condition, incident to that fever, and is suffering from some derangement of the stomach in consequence of the fever, should be placed upon a padded table on her back, and a man should place his left hand over her stomach and his right hand or arms under her limbs or knees, and should bend her forward so that the knees should almost touch the breast, and should then turn the lady over on her face on this padded

table, and place his left hand on the small of her back over her spine and his right hand under her knees, and violently bend the limbs and body upward, the lady never having suffered any injury to the back or spine or any complaints whatever with her back previous to the placing on the table as I have explained, and that afterwards there should be injuries to the spine and backbone, and to the ligaments and cartilage connecting the hipbone and backbone, what would you say had produced those injuries? (Defendants object to the question for the reason it is incompetent, and not a proper hypothetical question, and not founded on the testimony. Objection overruled, and an exception taken.)

A. I would say it was caused by the manipulations.

Q. I will ask you to state to the jury whether or not, assuming the facts as I have stated them in the hypothetical question which I have just asked you, a treatment of that character for the debilitated condition of the stomach and derangement of the stomach or any womb trouble would be the proper treatment?

A. Such manipulations could have no beneficial effect in a remedial way in treating any of the diseased conditions that have been enumerated.

Q. That could have no beneficial effect? What other sort of an effect would it have, if any? I am asking you whether or not that was proper treatment, in your opinion?

A. No, it was certainly not; for all medical treatment or manipulations are supposed at least to be for the benefit of the individual, and for the purpose of effecting a cure, and this could not benefit an individual suffering with the conditions that have been enumerated.

Q. Doctor, from the examination that you have made of this lady, state what, in your opinion, will be the effect of these injuries on her health?

A. I think it will give her a weak back, a painful back, for the rest of her life. It is a year since I examined her, or nearly so, and she is still suffering with pain in that part of her back, and the repair of it should have been effected within a year; should

have been so complete that if she was going to be entirely cured it would have been effected already.

Q. Doctor, state, in your opinion, what will be the result of these injuries on this lady's life as to duration of life?

A. I do not think that it will materially affect her life.

64 L. R. A. P. 969.

Particular attention is called to the similarity of the movements in this case to the movements used by Osteopaths and by some incompetent Chiropractors.

We venture to say there are very few practitioners using sulphur baths, violet rays, massage and dietetics who think that they are as responsible as an allopathic physician.

Suppose the patient failed to get results and the M. D. physician should testify that the treatment was wrong and negligent and caused the injury. This would not happen to a person who held himself out only as a Chiropractor, as will be explained in a later chapter. The only thing that would prevent large malpractice suits against some mixers is their poverty.

Another special contract frequently made by mixers is as follows:

When the mixer is employed, he frequently either gives or authorizes medicine. Again the mixer who gives medicine or who authorizes the use of medicine in his professional capacity steps out of the theory of Chiropractic and steps into the theory of the allopathic M. D.

Paul Jones, Chiropractor, has a patient who had a headache. Jones is consulted as a Chiropractor but gives his patient medicine, or advises that his patient take medicine. One is just as bad as the other because one must have just as great a degree of learning and skill to advise medicine as to give it. It is well settled that Jones thereby represents that he is possessed of the degree of learning and skill as is ordinarily possessed by the ordinary allopathic physician of the same or similar locality.

Other examples are the mixers giving professional allopathic advice concerning the care of the body and care of the teeth. If

this advice is given, it is surely negligent unless the mixer can show that he possesses the same degree of learning and skill of the ordinary allopath M. D. or dentist.

Another case which came under the author's observation was a practitioner who called himself a Chiropractor and was consulted by a person having a broken finger. The Chiropractor put a splint on the finger, which became very much inflamed and had to be amputated. Result, malpractice case of \$10,000.

From the preceding cases it is obvious that the practitioner held himself out in law as having the learning and skill of the average allopathic surgeon in the same or similar localities. He did not have that learning and skill and that fact alone was negligence. In his community there would be plenty of allopathic physicians to testify that he did not have the learning and skill of an allopathic physician in relation to the setting of broken fingers. The practitioner should have immediately informed the patient that he was not a surgeon and advised him to go to a surgeon.

Another case which came under the writer's observation was as follows: A woman was injured in an automobile accident. She suffered several subluxations of vertebrae and in addition the cartilages of the ribs near the breast bone were bent but not broken. The Chiropractor adjusted the vertebrae back to their normal alignment but also discovered the bent cartilages and bent them back to their normal position. There were no evil results but the Chiropractor stepped outside the practice of Chiropractic when he attempted to bend back those cartilages and immediately he stepped into the field of a surgeon and held himself out to the woman patient as possessing the learning and skill of a surgeon, and if he did not possess that learning and skill it was negligence, for which the Chiropractor was liable for any injuries which might have resulted. The Chiropractor should have immediately informed the patient that he was not a surgeon and directed her to one, unless he preferred to run the risk of a malpractice suit which might leave him penniless.

Another case which seems very common is the practice among certain Chiropractors to give advice and directions concerning the eating or abstaining from certain foods. For instance, John Jones advertises as a Chiropractor and upon being consulted asks his patient the following questions:

- Do you use a large amount of sugar?
- Is your diet a steady diet of one kind of food?
- Do you eat a large amount of meat?
- Do you drink a large amount of water?
- Do you smoke or chew tobacco to excess?
- Do you use liquors to excess?

When the Chiropractor receives and tabulates the answers, he then gives the patient some professional advice concerning the use of foods. Now, the mystery of foods and their action in the body is almost as much of a mystery as the mystery of the actions and reactions of medicine. Of the seven to eleven thousand medicines in the Pharmacopeia there are indeed very few that the allopathic physician can tell the exact chemical changes which that medicine goes through or causes. He may be able to tell you the effect on the stomach but not on the liver, or he may be able to tell how it may effect the liver but know nothing of its effect upon the ductless glands or the prostate. He very probably does not know the exact chemical change which takes place and will readily admit that the change and effect is different in each different purpose. For instance, a frail woman, 45 years of age, weighing 109 pounds, with blood chemically free from poisons, and a strong man 28 years of age, weighing 190 pounds, with blood chemically full of nicotine, alcohol and other poisons, even the most inexperienced layman can easily see that the chemical reaction and effect is different on the woman than on the man, probably entirely different, although the author would not even venture a guess as to what that change, reaction or effect would be even from the commonest medicine. The reader can easily see that the prescribing of medicines is still in that mysterious darkness in which the physician may guess right or guess wrong, but here is the important thing;

if anybody wishes to enter this guessing contest he must have the learning and skill of the average allopathic physician or he is guilty of negligence and liable in damages for any evil effects.

Right here you will probably say, "The allopath physician gives medicine and gets bad results." But you must remember that when that situation arises the defense of the allopath physician is that he might have used a number of remedies recognized by the medical profession and that he merely used his best judgment. However, the use of the best judgment of the practitioner is no defense where there is not sufficient knowledge or skill possessed by the practitioner upon which the practitioner can base his judgment. In order to form a judgment as to which medicine to give, you must first have knowledge and learning about all medicines, so that knowing all that, you can arrive at some decision.

Now, the physicians themselves cannot always guess right; they have evil effects. If you think you will always guess right, never guess wrong, never have any evil effects, then you may guess without fear of malpractice suits, but if you do have evil effects you will be liable in damages.

This same lesson applies in a lesser degree to the advice and prescribing of foods. The effect of foods upon the human system depends upon the chemical reaction and the chemical change which takes place in the body. Some people easily digest some food which makes others sick. The whole effect of different foods upon different peoples in different climates of different ages, sex, working conditions and state of health is for all that has been done upon the subject, still in the land of mystery, and is ably illustrated by an old story. A physician was called to see a blacksmith sick with typhoid fever. He was very sick and the physician tried various medicines, without success. The blacksmith kept demanding a watermelon to eat and the physician told him, "Why, man, a watermelon will kill you." "I don't care," the blacksmith replied, "I want a watermelon." "All right," the

physician said and got him a watermelon, of which the blacksmith ate the greater part and very quickly recovered.

Soon after that this same physician was called to attend a preacher, also sick with typhoid fever, and despite the physician's medicine, grew worse and worse, until at his wits end the physician said, "Now, preacher, I have done all I can. There is only one thing more I can do and that is to give you a watermelon." "But," the preacher said, "I know if I eat a watermelon I am going to die." "Well," the physician said, "that is the last hope." So they brought the watermelon on and the preacher ate some and promptly died. The physician studied awhile and then wrote this in his note book: "Typhoid Fever. A watermelon properly given will cure a blacksmith but kill a preacher."

However much mystery there still may be concerning the chemical reaction of foods, it still remains a part of the science of the allopathic physician as much as the giving of medicines and drugs. Professional advice concerning the eating of foods is nothing new. Allopathic physicians have done it for a long time when occasion demanded. The regular M. D.'s are writing books about it all the time, which doesn't mean that overly much progress is being made, although some undoubtedly is.

But remember this, that the giving of foods and medicines, the chemical or physiological effect upon the human system, are alike enough to be twin boys, and both are included under the science of allopathic medicine.

Now, therefore, when this Chiropractor gives advice concerning foods he is clearly doing something which is within the province of allopathic medicine, and when he does so he holds himself out as having the learning and skill of the average physician, etc., and, if he has not that learning and skill, he is guilty of negligence and liable in damages for any evil results. If the Chiropractor thinks he will always guess right on diet, always get good results, then he can give dietetic advice without fear of malpractice suits, but if there be evil results and your enemy find it out, then watch out for a malpractice suit. There is no intentional

effort here to belittle dietetics or medicine. There is undoubtedly some good in both, although the author does not profess to know how much. There is also some good in Surgery and Christian Science but because there is would you say it is advisable for you as a Chiropractor to perform operations? The writer does not say "Mr. Chiropractor, thou shalt not give medicine, advise diet, perform surgery", he merely aims to point out to you the dangers in case you do. You, Mr. Chiropractor, may have done these very things and had no malpractice suit, but that does not mean you are not going to have one. You may be poor, in which case you do not need to fear malpractice suits, unless you are in a state where they can get a tort judgment against your body and put you in jail. On the other hand, if you advise foods and have not the learning and skill of the allopathic physician and injury results, a good lawyer can get a judgment against you.

About as far as a Chiropractor can go with respect to diet without going outside the limits of Chiropractic is to explain thoroughly the Art, Science and Philosophy of Chiropractic to the patient, especially the Philosophy of Chiropractic with regard to digestion, the relation of the normal flow of impulses of innate intelligence to normal digestion, the inadvisability of over-eating, and over-drinking, the theory that innate will advise the body through the appetite what foods are best for the body. This in reality is merely teaching the philosophy of Chiropractic to the patient and letting him select his own diet. That is very much different from advising this patient to eat certain foods for breakfast, others for lunch, etc. The first is squarely within the philosophy of Chiropractic because it is the philosophy. The second, telling the patient what foods to eat, is squarely outside the philosophy, different foods acting different on each different person.

My advice to the Chiropractor is not to prescribe diet for two reasons, first, the liability of malpractice, second, the probability that if you do get results, the patient eight times out of ten will give more credit to the diet than to the adjustment of Chiro-

practic. Ask yourself in all fairness this question, "Does that help you as a Chiropractor or Chiropractic as a profession?"

Now, if after all this you still feel an overwhelming desire to prescribe diet or medicine without regard to liability for malpractice or injury to the profession, then I still advise to you, refer them to a physician and if you will not do that the only way you can lessen the risk at all is to explain that the prescription of drugs or diet is no part of your profession, but that they must rely upon the advice of a physician or such home remedies as they may choose themselves, to avoid constipation, exposure, etc., until Chiropractic adjustments allow a normal flow of innate intelligence to the different organs which will make them function normally.

The author has come into contact with practitioners who have advised salts. There is no other conclusion but that the prescription of salts is within the province of the allopathic physician, and that the practitioner when he gives the salts represents that he has the learning and skill of the allopathic physician, etc., and the lack of such learning and skill is negligence and if injury results therefrom he is liable in damages.

The public in general condemns this sort of thing and on a criminal trial of this Chiropractor for practicing medicine without a license a jury, not a judge, but a jury found him guilty and fixed his punishment at thirty days in jail and a five hundred dollar fine, while in the same court house a short time thereafter a straight Chiropractor was tried for the same offense and the jury returned a verdict of "not guilty". The distinction as expressed by one jurymen was that one had a profession and the other was an imposter. The purpose of this work and every Chiropractor should be to keep Chiropractic on the basis of a profession.

The author has explained many of these things to practitioners in the field who, on learning the truth, became straight Chiropractors in reality. It is no part of this work to criticise, for it is the belief of the author that many Chiropractors do not realize the legal effect of some things they do, and that when they find

out the right they will quickly conform to it. That, of course, is one of the main reasons for this book.

When any Chiropractor who has his profession at heart thinks over the proposition he will readily see that no matter what is to be said for the good points of dietetics or allopathic medicine, that the aim of every good Chiropractor would be to keep Chiropractic on the basis of a separate and distinct profession; in other words, an Art, Science and Philosophy in which everything is done for a specific purpose at a specific place in a specific way with a specific source of force to produce a specific result.

In a recent case against a Chiropractor for malpractice for \$25,000 the plaintiff testified that the Chiropractor used a hot light, that he prescribed "Stanolind", an oil for constipation, by writing the name down on a piece of paper and indicating the drug store he was to go to; that the Chiropractor gave him a dozen pink pills and finally that the Chiropractor would insert a rectal dilator every time he came. In justice to the Chiropractor it may be stated that he vehemently denied doing these things. It made, however, a very ticklish situation but fortunately for the Chiropractor, the attorney for the plaintiff overlooked it.

The use of these adjuncts were no part of Chiropractic, but part of the system of the regular allopath, and the Chiropractor was liable for the care, skill, diligence and judgment usually exercised by allopath physicians. The plaintiff's attorney could have inquired these questions:

How does "Stanolind" put the subluxated vertebrae back into alignment?

How do pink pills put a subluxated vertebrae back into alignment?

How does a rectal dilator put a subluxated 5th dorsal back into alignment?

Luckily the plaintiff's attorney did not ask those questions or request any damaging instructions; the case went to the jury on the Chiropractic theory alone, and the case was won with the jury.

Another situation which has occurred is that of Chiropractors who have patients with broken arches and attempt to restore the fallen arch by means of manipulation.

The question at once presents itself, "What degree of skill and learning is required of the practitioner in this case." The first step is to inquire whether this manipulation is generally accepted as a part of the theory and practices of the Chiropractic school which all its members profess to follow.

If it is not within the Chiropractic theory as above defined which becomes a question for the Court, then the practitioner holds himself out as having the learning and skill of the average allopathic physician and if he does not possess that learning and skill he is guilty of negligence and is liable for any injuries resulting therefrom.

The author, of course, in talking with these practitioners endeavors to persuade the practitioner to limit his practice to the science of Chiropractic and during the conversation he is frequently asked this question: "Well, that method is a good thing and why shouldn't I use it?" and the only answer made is this:

Granted that is a good method. Go further and also grant that surgery setting a broken arm is a good method. That medicine may sometime be a good method. Then, Mr. Chiropractor, where are you going to stop? You are a straight Chiropractor in feeling and you say that as far as you would go would be a vibrator. But if you overstep the line what are you going to say about Jones who prescribes salts because he thinks it is a good thing, or what are you going to say about Dr. I Set Em, Chiropractor who sets broken fingers because he thinks surgery is a good thing, or what criticism can you make of Dr. Bath Em Chiropractor who when asked for an adjustment gives a sulphur bath because he thinks sulphur baths are good things.

Those who use all these adjuncts may be divided into several classes. First, there is the practitioner who loves Chiropractic, has faith in it, believes in it, knows the wonders it will do, and who still does something else because he thinks there is some good

in it. This man becomes straighter than a string when the position is fully explained, because he knows his success as a Chiropractor depends upon the patient giving him the credit for the good results, instead of violet rays.

Second, there is the Chiropractor who does not particularly love Chiropractic, who doesn't know its philosophy, who never did make a rattling good success of Chiropractic and who buys an electric vibrator because he thinks it will give him something more to sell. This fellow Mr. Straight Chiropractor, you and I can't reach. He doesn't care about Chiropractic and he hasn't got sense enough to know that the patient who gives the credit for his cure from pneumonia to violet rays instead of Chiropractic adjustments it not a particularly good advertisement for Chiropractic. I suspect the straight Chiropractor must fight this kind of mixer to avoid twenty-five cent adjustments.

The Chiropractor who loves Chiropractic knows that both his success as a Chiropractor and the quick advancement of Chiropractic as a science depends upon the patient giving Chiropractic the credit instead of the violet ray, sulphur bath, dietetics, etc. He can reason it out or knows from experience that if he gives the patient a sulphur bath and at the same time an adjustment that the patient will give the credit of recovery to the sulphur bath instead of the adjustment. Which do you want, Mr. Chiropractor? Do you want to be regarded as a professional man with a wonderful science which gets marvelous results or do you want to be known as a man who gives very good baths which tone you up and gets results, or further be known as a good "rubbin" doctor.

Well, the Chiropractor who loves Chiropractic wouldn't do a thing outside of Chiropractic for anything because he wants Chiropractic to get the credit for the recovery. He wants to place Chiropractic on the plane of a science.

But the fellow who doesn't love Chiropractic, doesn't care. He talks about his right to do this and do that, to give a pill or

set a finger, or rub them up the back and down the stomach, but does he care about the science of Chiropractic?

Let me ask you this question: Suppose you believed the giving of sulphur baths was a good thing but that the giving them in conjunction with Chiropractic adjustments was not for the best interests of Chiropractic. Do you love your science of Chiropractic enough to discard the baths?

If you want to test a Chiropractor ask yourself these questions:

Are you striving to perpetuate and raise the standard of Chiropractic science?

Do you care whether the Chiropractor is known as a professional man or as a masseur?

The question has often been asked, "Would I be mixing from a malpractice standpoint if I advised foods, exercise, etc." The only answer the writer can make is to give the rule:

First—The Chiropractic system contains its theory of what is the cause of the patient's disease.

Second—A method of determining what is the cause of the patient's disease.

Third—A method of eliminating the cause of that disease.

A more complete discussion of that theory is contained elsewhere.

The rule is this: If the act is contained within the purview of the system as defined, and is incident to and in harmony with that system then for the purposes of malpractice it would come under that system.

Let us take an illustration:

ADVICE ON DIET

If you teach the philosophy of Chiropractic to your patient you will tell him how the innate intelligence will cause the stomach, etc., to function normally provided the flow of innate to the stomach is normal, in which case the stomach could digest normal foods, innate as a general rule advising which foods to eat.

That if an impingement of nerves from a sixth dorsal subluxated vertebra allows only a deficient flow of innate to the stomach, the stomach will not function normally and probably be unable to digest normal foods until the adjustments allow a normal flow of innate to the stomach and that the only limitation on the foods to eat is to be determined by the patient himself, which is the foods he can digest.

That innate has made an allowance for digesting normal foods but not for digesting abnormal foods, or over-eating or over drinking, and that those things must be settled by the patient.

Now take the other side. The Chiropractor instead of explaining the philosophy of Chiropractic to the patient in relation to digestion does this: He prepares a dietetic chart and says to the patient: For breakfast eat $\frac{1}{2}$ Grape Fruit, $\frac{1}{2}$ dish oatmeal with cream, 2 slices of ham or bacon with eggs, toast, 3 slices, one cup hot milk.

This is what is called prescribing diet. The chemistry of digestion is still in darkness. What you prescribe for Jones may be wrong for Smith. At best it is a guess and the Chiropractic philosophy of allowing innate to select her diet is to the writer's mind the best and soundest principle.

In the first illustration you have kept squarely within the philosophy of Chiropractic from a malpractice standpoint.

In the second illustration you have prescribed diet and gone outside of Chiropractic philosophy, and all in some measure inconsistent with it. Then you are no longer protected by the Chiropractic rule but come under the Allopathic rule.

Now then, take postures and exercises. It is the Chiropractor's duty to teach the philosophy of Chiropractic to his patient. Certain postures and lack of certain exercises or other things may cause subluxations of the vertebrae and it is his duty to explain those things to his patient and warn him against them and all that is within the philosophy of Chiropractic.

But on the other hand it is no part of his philosophy to tell the patient to take a cold bath every morning to increase circula-

tion because that is not part of Chiropractic philosophy and has nothing to do with the subluxation of the vertebrae in the first place or the correction of the subluxation and such advice would be outside of Chiropractic, mixing, and necessarily under the medical rule.

For the Chiropractors who are interested in advertising, the following advertisements were taken from a telephone book in a large city. Analyze them and see if you can determine, first, what the practitioner represents, second, the effect of the representation in law.

Telephone SUNnyside 1895
PEARL M. AUGHINBAUGH
Chiropractor

Natural Therapeutics and Electric Treatment
Hours 10 A. M. to 7 P. M.

Sundays by appointment Suite 2
1 Block East of Broadway 1039 Wilson Ave.

In this case, would the practitioner be tried in a malpractice suit according to the Chiropractic standard, or the Allopathic standard, or both or either?

What does the following advertisement hold out to the public and what different degrees of care would be required in a malpractice case?

DR. A. T. ITCH—Licensed Chiropractor
Naprapath Cosmopath
Mechano Therapist Physco Therapist
My combination of treatments will cure you.

Can this man defend himself by saying he only held himself out as a Naprapath or a physco-Therapist or is the jury going to require a very high degree of care? What happens if these theories are opposed to each other?

The opposing lawyer would then say: These theories are opposed to each other. Which one do you believe in? Or do you believe in both, or do you believe in neither, or did you put those

things in your advertisement just to attract patients? Did you tell this patient you would cure him?

It is apparent that this lays the practitioner open in so many different ways that the jury if they thought the patient was injured or the practitioner a fake could give very heavy damages.

What about this advertisement?

Dr. Henry Skinem

Chiropractic, Osteopathy, Electro Therapy,
Biological Bloodwash Treatments

Lady and Gentleman Doctors in Attendance

What skill and what learning does this man hold himself out to the public as possessing? What is the probability of his being tried according to allopathic theory? Would a jury verdict against him stick?

THE CHIROPRACTIC AND ELECTRO THERA-
PUTIC INSTITUTE
NERVE AND SPINE SPECIALISTS
MECHANO THERAPY AND ELECTRICAL
TREATMENTS

What degree of care do you think the Court would require of this man? What does he represent to the public? What would be the effect if he could not qualify before the eyes of the jury?

CHAPTER VII.

CHIROPRACTIC THEORY

This work would hardly be complete without a chapter on Chiropractic from a legal standpoint. The writer does not pose as an authority of Chiropractic. The word "Chiropractic" has been defined enough times by the courts to stabilize its meaning. Suffice it to say that these cases have always confined the theory and practice of Chiropractic to the spine. There are many of such cases but the names and places where such cases can be found in the law reports are omitted, inasmuch as some of them are criminal cases which contain some observations unfavorable to Chiropractic, with which the author does not agree, and which with regard to some of the observations have been overruled by some later decisions involving Chiropractic and which have extolled Chiropractic.

It will also be interesting to read the testimony of what the principles, theory and practice of Chiropractic consists, recently given in a malpractice case against a Chiropractor for malpractice.

In order to give the Chiropractor the benefit of the rule that the practitioner is only liable for the care usually exercised by practitioners of the same school of medicine it is first necessary to prove that Chiropractic is such a school. As has been shown in the first chapter, there must be evidence showing that Chiropractic has principles with respect to the theory of disease, the method of finding out what is the cause of the plaintiff's ailment and a method of removing such cause.

The testimony of James Greggerson and W. C. Schultz, which follows, is part of the actual testimony taken in a malpractice case won by the U. C. A. By reading this testimony you can

see how it was proven that the Art, Science and Philosophy of Chiropractic has principles regarding the theory of disease which are entirely different from the allopathic theory; that the method of ascertaining what causes the disease or diagnosis is entirely different from the allopathic method; that the remedy or method of eliminating the cause of disease is entirely different from the allopathic method.

Now the allopathic school is a composite system. It has many theories of disease, (1) hereditary theory of disease, (2) Germ theory of disease, (3) Traumatic theory of disease, (4) Constitutional theory of disease, (5) Theory of Surgery.

All of these theories are worked out in the Allopathic theory of diagnosis which has been reproduced in a former chapter.

Third. What methods of treatment do the allopaths use? (1) They may use surgery and thereby attempt to make the organ mechanically perfect or remove the dirt and debris from the system. (2) They may use medicines to attempt to change the functioning of the human body. There are 11,000 medicines or drugs. They may use one or all. Most of them have been discarded as valueless or worthless. They may use and do use mechanical means. Yes, they use violet ray. Yes, they use massage. Yes, they use hydrotherapy. Yes, they use X ray. Yes, they use dietetics. Yes, they use baths. Allopathic medicine includes all that.

The answer is that people who use the allopathic system of diagnosis must use the care and the skill of an allopath.

People who use X ray, violet ray, dietetics, baths, vibrators to relieve disease will be responsible to the patient to use the same skill and care as the allopath physician.

Notice from the testimony how sharp is the difference between the Chiropractic theory and the allopathic theory.

The practitioner who mixes the two sciences, Chiropractic and Allopathic, is much like the deserter who is between the battle lines of the German and allied Armies.

ON THE WITNESS STAND FOR CHIROPRACTIC

James G. Greggerson, being duly sworn, testified:

Examined by Mr. Holmes.

Q. Where do you live?

A. Davenport, Iowa.

Q. What is your profession?

A. Chiropractor.

Q. Graduate of what college?

A. Palmer School of Chiropractic.

Q. Will you state the theory of Chiropractic in regard to disease?

A. Well, the chiropractic theory of disease is that disease is simply an abnormal expression of function; that in the human body there is a spiritual something that builds the body and carries on all the functions of the body, by means of impulses that are sent over the nerves; that these impulses are generated or created in the brain and pass down through the spinal cord and out through the spinal nerves, and that by means of these impulses the stomach digests food; the liver secretes bile; the heart pumps blood; the lungs throw out the carbon dioxide and take on oxygen; the body is made to move, etc. All the functions of the living body are brought about by means of these functional impulses, that travel down through the spinal cord and out over the spinal nerves to the different parts of the body. When a vertebra in the spine becomes mis-aligned and presses on one of these nerves and stops the flow of functional impulse to any cell or part of the body, the result is what is called disease. In order to get the patient well it is necessary to have a normal flow of functional impulse to that part; which means, that the pressure must be removed from the nerve, and that is done by adjusting the vertebra to normal position.

Q. Now what is the method of diagnosis used by the Chiropractor?

A. The Chiropractor palpates the spine for the purpose of finding which vertebrae are subluxated and impinging the nerves,

thereby shutting off a normal supply of functional impulse to the tissues supplied by those nerves.

Q. Using this for example, (handing witness skeleton of the spine).

A. The Chiropractor palpates the spine, that is, he feels with his fingers down these spinous processes for the purpose of finding whether those processes are in alignment or not; and then, finding one that he suspects is out of alignment, he finds where the nerves from that vertebral emit and presses on them to ascertain whether they are tender or not. Then there is the spineograph or X ray machine by which he takes a picture of those vertebrae to see whether they are in alignment or not. That is the method of ascertaining what is the matter with the patient, or rather the cause of his condition.

Q. When he finds one of those vertebra out of alignment what does he know?

A. By the mere fact of a vertebra being out of alignment he knows nothing; but when he finds the nerves tender he knows that there is a nerve pressure, and then he knows by the fact of being out of alignment, that it is causing an impingment of the nerves, and he knows further that the part of the body supplied by those nerves, is not functioning normally.

Q. What is the result of their not functioning normally?

A. That is what is commonly called disease, and its nature depends upon which function is involved. There are nine functions and then there is the combination of those nine functions, which results in a multiplicity of conditions.

Q. What are the nine functions?

A. The motor function, to move; the secretory function, that has to do with the secretion of the gastric juice, the secretions of the spleen, the saliva, etc.; the calorific function, which has to do with the heating of the body; then there is the trophic function, that has to do with the nourishment of the body, the converting of food into living flesh; there is the excretory function; the throwing out waste material, worn out tissue, etc.; then there is the repara-

tive function, what has to do with mending broken bones, healing wounds, burns and scalds; there is the reproductive function, that has to do with reproducing the species. There are two others I can't recall. There are nine functions in all. There is the motor and sensory, the calorific, secretory, excretory, reparative, reproductive, expansive and tropic.

Q. Now then how is the Chiropractor to put that subluxated vertebra back into alignment?

A. By first determining the position that the vertebra out of alignment is in; that is, how it is subluxated; and then he gets his hands on the spinous or transverse process and adjusts it to normal position.

Q. Does it always stay adjusted to normal?

A. No; it generally requires repeated adjustments to get it to remain in normal position.

Q. Are there cases where they do not stay, refuse to be moved to normal alignment at all?

A. Oh, yes, there are such cases. For instance, there is what is called an ankylosis, a condition where two or more vertebra are grown together, and then it takes a long, long time to adjust, to get that ankylosis dissolved so as to permit the adjustment of the vertebra to the proper position.

Q. When the vertebra move to normal alignment what does that do?

A. That opens the foramen,—the openings where the nerves come out between the vertebrae; reduces the pressure on the nerves and permits a normal flow of functional impulse over the nerves to the part.

Q. What does that do?

A. The result is a restoration to health.

Q. Is the chiropractic system of diagnosis different from the medical diagnosis?

A. Absolutely.

Q. What is the difference?

A. Well, the difference can only be understood when you take the object into consideration. The object of the Chiropractor is to find the cause of the condition. The object of the other school is to determine a condition. If you went to a physician with stomach trouble he would try to find out what kind of a stomach trouble you had. If you went to a Chiropractor he wouldn't be particular about what kind you had; he would be particular about finding out what caused that stomach trouble, knowing that, if he found and removed the cause the stomach trouble, whatever its nature, would disappear.

Q. How would he go about it, to find out what caused it?

A. He would palpate that spine and trace the tender nerves.

Q. If he found the fifth or seventh dorsal out of alignment would he have occasion to suspect stomach trouble?

A. That would be a logical conclusion from his findings.

Q. And under those conditions would he have any occasion to suspect liver trouble?

A. You see you can not take a certain vertebra and say if a certain vertebra is mis-aligned there will be a certain disease or a certain organ or function affected. Anyone who knows anything about anatomy, knows there is individual variation in the structure of the body as there is individual variation of the features of the face. While the spine is generally mapped out according to the tissues that are supplied by certain nerves yet it does not follow that the nerves to certain organs or tissues always emit at that point. For instance, if a person came in with something the matter with the face, I would have no right to conclude because it was at the forehead that the trouble was at the first cervical and the trouble in the nose at the second spinal vertebrae, etc. I would know it was most likely somewhere in the cervical region. It would probably be—(but not necessarily)—a subluxation of one of the cervicals, that is, the first, second, third, fourth or fifth. That is *probable*, but there is also a possibility of it being caused by some other vertebra in the spine.

Q. Suppose that he found a certain vertebra out of alignment and pressure upon a certain nerve or nerve trunk, would he then have occasion to believe that the organs and tissues which this nerve trunk supplied were not functioning properly?

A. He would *know* that. If he found a certain vertebra subluxated and a nerve tenderness from those nerves he would know that the tissues supplied by that nerve were not functioning normally. Now the degree of the abnormal functioning, or of their lack of function, would depend upon the degree of pressure.

Q. What is the theory of Chiropractic regarding tumors?

A. Well, tumors are the result of an abnormal metabolistic function in the body. Metabolism is one of the functions; generally called trophic; and has to do with the tearing down of old cells and the building up of new cells. In case of tumor the Chiropractor knows there is something the matter with the nutritive function in one case, or in the other case (for instance in the nature of a benign tumor) he knows there is something wrong with the excretory function. I don't know whether I have made that plain. For instance, if you have a wen on your head (that is one kind of a tumor) it is a benign tumor; not deadly. That would not be due to the fact that the tissues were not nourished properly; it would be due to the fact that the cells, or the pores through which this poison was to be eliminated were not functioning, and the poison stayed in there and formed a tumor that later perhaps became encapsulated.

Q. What do you mean by encapsulated?

A. The power within the living body puts a capsule of tissue around the foreign body, separating it from the rest of the flesh, and it lies there. There is some tissue put around the tumor to protect the general tissue and it lies there and does no further damage.

Q. And the theory of chiropractic regarding tumor is that it is caused by the failure to function or abnormal functioning.

A. Something to do with metabolistic functioning. It is the result of an abnormal metabolism.

Q. What causes that?

A. That is caused by a pressure upon the nerve stopping the flow of mental impulses to the part.

Q. Would it make any particular difference where that pressure on that nerve was applied?

A. In respect to what?

Q. I am speaking now of a man who had—I will withdraw that question. If a patient went into a Chiropractor's office and this patient had lack of appetite—loss of appetite, and also had headaches in the back of his head, dizziness, and the Chiropractor on examination of the vertebra, of the spine, found that the fifth dorsal and the seventh dorsal were pressing upon the nerves, and that the second cervical was out of alignment, would it be your opinion that the Chiropractor, in diagnosing the ailment of the man as being a functional disorder of the stomach or liver, was exercising the care of the ordinary Chiropractor in the same and similar localities as Kenosha under the same or similar circumstances?

A. I dare say that is the conclusion that more than ninety-nine percent would come to.

Q. Assume those conditions stated in the last question and the further condition that there was loss of weight, would that cause you to change your answer any?

A. No.

Q. Add to those symptoms the fact that the patient vomited, would that cause you to change your conclusions?

A. No.

Q. If the patient had swimming of the eyes, would that cause you to change your conclusion?

A. No.

Q. And under those conditions would the average Chiropractor in the same or similar localities as Kenosha continue to adjust the vertebra, the fifth and seventh dorsal and the second cervical?

A. Yes, sir.

Q. In your opinion would the average Chiropractor in the same or similar localities as Kenosha, with the average skill and knowledge, under the same or similar circumstances, diagnose such a case as tumor of the brain?

A. I don't believe I get that question, "under the same or similar circumstances."

Q. I will repeat it. Assuming that the patient had the symptoms which I have related in the last few questions, would the ordinary Chiropractor, in the same or similar localities as Kenosha, possessing the degree of skill and knowledge and using the degree of care of the ordinary Chiropractor in the same or similar localities as Kenosha, diagnose that as tumor of the brain?

A. No. The fact of the matter is, as I stated previously, the Chiropractor is concerned with the cause and not with the name of the condition, the name ascribed by somebody else. I don't know that I understand your question.

Question read.

A. Never, from those symptoms.

Q. Do you know how many Chiropractors there are in the United States following the Chiropractic profession?

A. About twenty-five thousand.

Q. About how many schools are in operation teaching the Chiropractic science?

A. I would say approximately one hundred.

Q. Have you been in most of those schools?

A. I have been in a large percentage of them.

Q. Do you know the theories of their practice?

A. I do.

Q. All Chiropractors are supposed to follow and profess—follow and practice the Chiropractic theory.

A. Yes sir.

Q. To profess the theory of diseases which it teaches?

A. Yes sir.

Q. Those rules are for the guidance of all.

A. Yes sir.

UPON THE WITNESS STAND UNDER CROSS EXAMINATION

James G. Greggerson on the witness stand.

Cross Examination by Mr. Baker.

Q. Are you connected with the school of Chiropractic?

A. No sir, I am not.

Q. Are you a practitioner?

A. Yes, sir.

Q. At Davenport, Iowa.

A. I am what you might term a consulting practitioner.

Q. Your residence is Davenport, Iowa?

A. Yes, sir.

Q. In this system of treating disease do Chiropractors make a study of the symptoms of disease?

A. There is a study of symptoms, yes. There isn't a study of symptoms with the idea of giving them the importance that they have in other systems, for instance in the allopathic system.

Q. In answer to Mr. Holmes' question you said under certain symptoms stated in this case you would not believe that a Chiropractor would diagnose this man's trouble as tumor of the brain.

A. Yes, sir.

Now what other symptoms, under this system of treating disease, would you have to know before you would say that a Chiropractor should assume that there was tumor of the brain?

A. Well, from what I know of symptoms I would say before he would have any right to even suspect anything like a tumor there would have to be something in the nature of a pressure symptom.

Q. You have no different opinion upon that than the old or regular school of medicine, have you?

A. I don't know. I don't know as there is.

Q. The doctor—you heard him give his testimony in that line?

A. Yes, sir.

Q. Then isn't it necessary to study symptoms of diseases?

A. Well, I don't know of anybody that treats diseases, or in other words makes an attempt to get people well, that doesn't take the symptoms into consideration; but then there is a difference in the relative importance that they attach to the symptoms, and the use they make of them.

Q. From your experience you have the same symptoms when the disease may be different, do you not?

A. Oh yes; that is, according to the classification of symptoms.

Q. If you were to separate one system from another there would be certain symptoms present in different diseases.

A. Now it is pretty hard to make a connection that way; for instance you say "certain disease." Others call a certain combination of symptoms by a certain name. The name ascribed to a certain group of symptoms by other professions is a sort of container, the name includes all the symptoms and all the pathology connected with cases of that kind. We do not do that. We say that symptoms indicate which one of the nine primary functions is involved, and that the point of the pressure determines to a greater or less extent where those symptoms will manifest, in what part of the body. But we do not trace backwards; that vomiting for instance means something wrong directly with the nerves leading to the stomach; there may be something wrong with the stomach adaptively, the symptom may be an indirect symptom. We classify the symptoms as direct and indirect, but we do take the symptoms into consideration to ascertain which functions are involved and which tissues or organs are affected.

Q. Is that the only classification you have, direct and indirect symptoms?

A. Yes, sir.

Q. Did you ever observe a person suffering from scarlet fever?

A. I have observed people that suffered from what was diagnosed as scarlet fever.

Q. You wouldn't say they had scarlet fever, perhaps.

A. No, there is wide room for difference in that.

Q. Everything has to have some name, does it not? Anything on this earth that we discuss between individuals must have some name.

A. Yes.

Q. In every science and everything we do or think about.

A. Yes, that is necessary.

Q. So when I speak of scarlet fever I speak of a disease that is known by people as a certain condition of the human body.

A. I don't believe that you will find two cases of scarlet fever that are the same, I might better say, where the symptoms are identical.

Q. Will you find the symptoms in all cases of scarlet fever similar?

A. No, you will find a wide variety of symptoms; and the only thing you will find in all cases of what is diagnosed as scarlet fever, according to my knowledge, is a rash on the skin, and that also may be different in different cases.

Q. For instance, you have the fever, and you have the vomiting in scarlet fever, have you not?

A. Yes, you have generally.

Q. There is another class that we human beings talk about as diphtheria.

A. Yes, sir.

Q. Now the same symptoms are present in that disease to the extent of fever and nausea, are they not, as in scarlet fever?

A. I believe so. They may be.

Q. Now would a Chiropractor expect to find the same trouble with the same vertebra that caused both diseases, whether you call it diphtheria or whether you call it scarlet fever or measles, or any other trouble? Would it be the same vertebrae impinging upon the nerves that would produce all three of those diseases?

A. It might be, and might be a totally different one in each case.

Q. Now there is hardly any of those diseases that doesn't cause either vomiting or dizziness or headache.

A. Yes, there is an awful lot of conditions that cause all those symptoms.

Q. That results from most every disease—headache, dizziness.

A. No, not from most every disease.

Q. All the common diseases, as we express them in common language and common thought, ordinary every-day language, speaking of disease.

A. The import of your question is that these symptoms of dizziness and vomiting and fever are symptoms associated with most cases of disease.

Q. Well, with several cases of disease.

A. Yes, with several cases.

Q. I am not a doctor, so I don't know. I presume they are associated with diphtheria and scarlet fever and measles and some of those troubles.

A. Yes, sir.

Q. Well, the same symptoms, or some of them, would be manifested to the Chiropractor. Would he give the same treatment for one disease as another?

A. The symptoms would not determine what he did. That is where we differ from the others. For instance, if you take two cases that have been diagnosed as measles, it doesn't mean that the Chiropractor goes to certain vertebrae and adjusts certain vertebrae because somebody has called it "measles." He goes to the spine and finds which vertebrae are out of alignment, which nerves are impinged and then he adjusts according to where the nerve impingement is found instead of according to the name given to the disease.

Q. Do you mean that to the Chiropractor it is not necessary to know at all what the man is suffering from?

A. That all depends on who is to set the standard for what it is to be known. If the import of your question is that we have to go to the allopathic physician to find the particular name for a particular ailment, then the answer is No. It doesn't make any difference to the Chiropractor what somebody else has called the particular ailment or particular condition that that particular patient is in.

Q. If a person called for a conference, and he described his symptoms as best he could, then would all that the Chiropractor need do, be to examine his spine and to see if there was a vertebra out of alignment?

A. It is the practice of a great many Chiropractors that they do not ask the patient anything. They examine that spine and they come to their conclusion from the examination of the spine without asking the patient anything. They may ask them afterwards for their symptoms, etc., but any number of practitioners practice by simply finding the point of impingement, knowing that if they find the point where the nerve is impinged and adjust the vertebrae that is misaligned and causing the impingement, that the symptoms will disappear.

Q. Then is it their belief that all human ailments are centered in the spine?

A. No, sir. They differentiate in disease between disease that arise as a result of a lack of function and diseases that arise as a result of traumatic conditions. For instance in traumatic conditions, that is—blows, bruises, burns, excessive cold, excessive heat, etc., all are changes on the outside that overcome the resistance of the body. With that class of disease they have nothing to do, unless that particular trauma has produced subluxations of the vertebrae and caused nerve impingement. The other classification of disease is all that lack of function in the body such as is generally classified as heart trouble, lung trouble, stomach trouble, liver trouble, bowel trouble, etc.; and lack of motion, lack of sensation, lack of heat, lack of secretion or excretion, of reproduction, or something of that kind.

Q. Take for instance this case: Assume this man is suffering with a tumor today, is the seat of that trouble, the cause of that trouble, some impingement of a nerve in any of the vertebrae?

A. Yes.

Q. You believe that a vertebra being out of alignment has caused the tumor in this man's head?

A. Yes, without question.

Q. And all of the suffering has been due to that one condition.

A. Well, now you come to the secondary symptoms. You say: Is the tumor caused by pressure on nerves. I say, Yes, a tumor is caused by interference with the normal metabolism due to pressure on the nerves, shutting off the functional impulse to certain tissues. Then the tumor grows and because the tumor grows it presses on the adjoining tissue and caused other symptoms which were the secondary and the result of pressure by the tumor. These secondary symptoms are called secondary because they are due to the pressure of the tumor shutting off the functional impulse.

Q. Is it the tumor that caused the nausea and the vomiting and other symptoms, or was it the impingement upon the nerves which caused those symptoms?

A. That depends on what you want, whether you want the secondary or the primary cause, I would say the vomiting and the other symptoms was a result of the tumor, in the latter part of this case; and that the tumor, in turn, was the result of an impingement of the nerves, and the impingement of the nerves, in turn, was due to a subluxated vertebra, and the subluxated vertebra, in turn was due to the blow or trauma.

Q. Do you say, in order to cure this man's disease, you would first have to treat his nerves in the vertebra—I should say, put the vertebrae in proper alignment?

A. Yes, absolutely.

Q. And do you say when that was done that this man would be cured of his tumor?

A. I say if the proper vertebrae is adjusted in the proper way, and the pressure lifted from that nerve that is impinged thus causing that tumor, or abnormal expression of function, that that tumor would disappear.

Q. Why did it not disappear during the eight months' treatment?

A. Because the impingement was not removed from the nerve.

Q. Why doesn't it continue to exist at the present time?

A. It does continue to exist—the tumor does—and the tumor is growing.

Q. Why doesn't this man vomit, and why doesn't he stagger, and have those other symptoms?

A. Because they were secondary symptoms.

Q. There is nothing in the history of the case to show this man has had any other adjustments upon his spinal column since Dr. Volgman treated him.

A. There is history showing there was an operation which took the pressure of the tumor from the spinal cord and medulla oblongata, by letting it protrude out in the rear of the skull in the form of a hernia, instead of pressing upon the spinal cord and medulla oblongata.

Q. Wasn't the cause of all this trouble in the head rather than in the spinal cord?

A. I don't know that it was.

Q. Isn't the effect upon the spinal cord due to the cause up in the head?

A. The effect on the spinal cord?

Q. Yes.

A. I believe the effect on the spinal cord was due to the tumor after there was a tumor.

Q. And wasn't then, in turn, the vomiting and the dizziness also due to the tumor in the head?

A. I can not say that.

Q. You think that all those symptoms were due simply to the condition of the spinal column, impingement upon the nerves?

A. I think all his trouble, even at the present time, is due to the impingement of the nerves.

Q. What would there be about the growth of the tumor in the head that would cause a mal-alignment of the bones in the spinal column?

A. There isn't anything; but the mal-alignment of the spinal column might cause tumor in the head.

Q. Would you say the tumor in this man's head was caused by the mal-alignment of the spinal column?

A. Absolutely.

Q. Then under your theory of treatment it wouldn't be necessary to know what causes disease, would it?

A. That is the only thing that is necessary.

Q. Don't you believe that any treatment of, readjustment of, the spinal column would cure all disease?

A. If you permit me to define what disease is, if disease is an abnormal expression of function, then the answer is Yes. If disease is a cut or a burn or a bruise, then, No. We don't undertake with Chiropractic to get everybody well regardless of what they are suffering from.

Q. You mean by that any physical injury you can not cure by Chiropractic unless it is a physical injury to the back bone, do you?

A. No, that is not what I mean. There may be other kinds of injuries besides physical injuries. The only thing Chiropractic applies to is an abnormal expression of the nine primary physical functions.

Q. But you claim that all those disorders of functions are due to vertebrae out of alignment which impinge upon nerves coming through the spinal cord.

A. Primarily, yes, sir.

Q. And now you say that has caused tumor and you say that such a condition would cause other brain diseases?

A. Oh yes; we have lots of cases of insanity on record and that is a brain disease, where the patients recovered by adjustment of the vertebra of the spine; sometimes way down in this lumbar region.

Q. Why do you say that the seat of all disease is in the spinal column?

A. Because the spinal column is the only point at which there can be a primary interference with the flow of functional impulse.

Q. With the nerve force?

A. Yes, nerve force; functional impulse; life force; whatever you want to call it.

Q. Then do you believe that a man cannot be diseased in his brain, either by tumors or cysts, until he has had some mal-alignment of the spine?

A. Or until he has met with some accident that would bring about a bruise or concussion of the brain.

Q. If a person met with an accident that brought on a bruise on his head, and he suffered with symptoms such as this man has described, and upon examination he didn't have any mal-alignment, then how would the Chiropractor treat such a person?

A. They wouldn't treat; they don't treat such cases; they don't adjust for those kinds of cases. In the case you mention the person might be struck on the head with a club and of course have a concussion, producing a disturbance in the brain tissue, without any mal-alignment of the vertebrae; but the shock itself would produce a disturbance in the brain tissue that would manifest itself in symptoms of that kind. That wouldn't come under Chiropractic.

Q. Then if he consulted a Chiropractor and the Chiropractor found nothing the matter with the spinal column he wouldn't treat him at all.

A. No sir, they wouldn't do anything at all.

Q. You mean by that, that if they found mal-alignment of the spinal column, vertebrae, that, therefore, the trouble that the man is suffering from is due to the mal-alignment.

A. That is at least part of the reasoning.

Q. That is the theory of the system, is it?

A. That is one of the deductions.

Q. When they find that condition existing in the human body they go no further in considering the symptoms of disease or what is the disease. They take it for granted that that is the cause of the disease.

A. Yes, sir. They may go further, as a matter of curiosity, to find out whether or not the symptoms in the case correspond to the nerve distribution from that particular vertebra, but they lay it down as a hard and fast proposition that when a vertebra is mis-aligned and there is impingement of the nerves it will cause disease; and that when that vertebra is adjusted and the impingement is removed and the tissues again get the proper amount of functional impulse that that disease will disappear.

RE-DIRECT EXAMINATION. By Mr. Holmes:

Q. Chiropractors do not set legs or arms.

A. No, sir.

Q. Or perform surgical operations.

A. No, sir.

By Mr. Baker: Q. They only set back bones.

A. Yes, sir.

W. C. Schulze, being duly sworn, testified:

Examined by Mr. Holmes:

Q. What is your name?

A. W. C. Schulze.

Q. What is your profession?

A. I graduated from a medical school, and later became interested in Chiropractic.

Q. At the present time you are a Chiropractor?

A. I am.

Q. Do you know the principles and practice of the Chiropractic system?

A. Yes sir, I believe I do.

Q. You know the principles and practice of the Chiropractic system as respects diagnosis?

A. Yes, sir.

Q. And treatment?

A. Yes, sir.

Q. Will you please state to the jury whether the system of Chiropractic differs from the system of allopathic medicine both as respects diagnosis and as respects treatment?

A. COURT: Yes, or no.

Q. Does it differ?

A. It does.

Q. Please explain how.

A. In medical diagnosis we find out what the various signs and symptoms are, and what certain laboratory methods give us, and we base the diagnosis upon those findings. The Chiropractor bases his findings principally upon an abnormal position of one of the movable vertebrae in relation to the other. In other words, he examines the spine and bases his findings upon that.

(Showing witness skeleton of the spinal column.)

Q. Show the jury the Chiropractor method by the aid of the spine; the theory of disease of the Chiropractor.

A. The ladies and gentlemen will notice that there are a certain number of movable vertebrae one upon the other. Now each one of these, or practically each one of these vertebrae—with the exception of the first one upon which rests the head—has what we call a “spine” sticking out. You notice (indicating). From that the word “spine” is taken. These we call the spinous processes. Then we have on each side of one of these movable vertebrae other processes, you notice, the transverse processes. Now the Chiropractic theory is based upon the fact that the spinal cord, going through this tube in this center, gives off at practically each one of these vertebrae strands of nerves, which go out and

are distributed to the various parts of the body. And if it is a fact that when one of these movable vertebra is slightly—it need be but very slightly—out of the straight line or out of alignment, out of the position it should be, the little hole through which these strands of nerves pass becomes a little tiny bit smaller at one of its places so that there is actually a little pressure upon the nerves going through that particular part or segment, as we call it, of the vertebral column. Now the Chiropractor examines the spine carefully as a whole and then goes into detail as to the individual vertebra and upon the abnormal position he bases his findings.

Q. Now in the Chiropractic theory of disease where do the nerves come out?

A. The nerve come out of little openings in the facets on each side of these movable vertebrae. For instance, in the upper vertebrae which we call the neck vertebra, we have these facets. We have them in all but in the upper we have additional little holes for the veins, but the nerves come out right in between these little openings which you ladies and gentlemen can see here between these vertebrae.

Q. When one of these vertebra is out of alignment what happens to that hole?

A. That hole, is, at one part, made smaller, and there being but very little room, and nature not leaving a vacuum anywhere a very slight narrowing will cause pressure upon that nerve.

Q. Where it leaves the spine?

A. Yes, sir.

Q. What effect does that have?

A. The first effect with nerve interference is always very temporary and slight stimulation; and the later effect is a depression, which finally may end in paralysis, if continued.

Q. What goes over these nerves?

A. The sheathes first, and then the muscular layers.

Q. In Chiropractic theory is there nerve force that goes over these nerves, or nerve energy, whatever you call it?

A. The generator which we might call the brain sends the impulses down over these nerve strands or nerve paths.

Q. Where do they go to?

A. They go to the various parts of the body.

Q. To the different cells and different organs?

A. To the different organs.

Q. What makes these cells and organs function?

A. These cells and organs function by virtue of those impulses traveling over those paths.

Q. And when one of these vertebrae is out of alignment, pressing upon a nerve, what effect does that produce upon the functioning of the organ to which the nerve goes?

A. It produces an abnormality, a let-up of the function, or cessation of the function, in the part supplied.

Q. Which may result in different symptoms.

A. Yes, sir.

Q. Then what is the Chiropractic theory of the cause of disease so far as the Chiropractic analysis of the disease is concerned? Not all diseases; I don't mean broken legs.

A. Principally the pressure upon nerve tissue by the moveable vertebrae of the spinal column and its effect in the end organs.

Q. Now when the Chiropractor finds with his hands or fingers that one of these vertebrae is out of alignment what does he know?

A. He knows that the parts supplied through that strand of nerves over which or in connection with which the subluxation or failure of alignment takes place—he traces the trouble to its ultimate organ, or to the ultimate tissue to which that nerve goes; nerve tracing as they call it.

Q. He would know that the tissues and the organs to which that nerve went are not functioning normally. Is that correct?

A. Exactly.

Q. Now then the Chiropractic method of treatment is to what?

A. The Chiropractic method treatment consists in what in Chiropractic is known as "adjustment," or getting into the right position, of these bones, these subluxated vertebrae.

Q. Now then, they do that by their hands.

A. They do that by their hands.

Q. And they move these vertebrae towards their normal alignment. Is that correct?

A. Yes, sir.

Q. Until finally nature keeps them in the normal alignment?

A. Yes, sir.

Q. When these vertebrae are in their normal alignment state whether there is a normal flow of nervous energy to the different organs and tissues, or not.

A. There is a normal flow of nervous energy when these vertebrae are in alignment.

Q. And when the vertebrae is out of alignment is the flow normal?

A. There is an interference with that flow.

Q. And consequently what happens to the organs and tissue? Do they function normally or abnormally?

A. They do not function normally.

Q. That is different from the theory of diagnosis of the allopathic physician is it—or is it not?

A. It is; entirely different.

Q. As a matter of fact do the allopathic physicians believe in this diagnosis?

A. They do not.

Q. Now then, do you know about how many Chiropractors there are in the United States following this system?

A. Eighteen thousand, approximately.

Q. Do you know, approximately, how many schools there are that teach this system in the United States?

A. Thirty or forty.

Q. With relation to the allopathic system of diagnosis, what do they do first?

A. They consider only the symptoms of which the patient complains and, generally speaking, treat those symptoms.

Q. Treat the symptoms themselves?

A. Yes, sir.

Q. That is, treat the effects.

A. Yes, sir.

Q. Generally speaking do the physicians and surgeons treat the cause of disease?

A. They do not.

Q. What do you mean by that? Explain.

A. I mean that, generally speaking, an M. D. will listen to a patient's recital and make certain tests or examinations and then give medicine in accordance with the most pronounced symptoms in the case. If it is headache he very generally prescribes what we know as coal-tar products or aspirin or acetanilid, which we know cures headache. And so in many other cases a certain group of symptoms are taken together, those which bother the patient most, and for that the doctor prescribes.

Q. Now in case of headache what is the Chiropractic method?

A. The Chiropractic method is to ascertain the cause of that headache by finding the particular place in the movable part of the spinal column where there is an interference, with nerve pressure.

Q. Suppose there was an interference with the nerve going to the stomach, what would that cause in the stomach?

A. It would cause an abnormality.

Q. The stomach would not function properly?

A. No.

Q. When that is true are headaches ever the result?

A. Very frequently.

Q. Assuming that a man came to a Chiropractor who had a headache and the Chiropractor upon examination found that where the nerve leaves the vertebra to go to the stomach the

vertebra was out of alignment, pressing upon that nerve, to what would the Chiropractor normally ascribe the headache?

A. We would ascribe it to the particular organ affected by the subluxation, or by the pressure.

Q. If the nerves going to the kidneys were being pressed upon so as to prevent a normal flow of nervous energy to the kidneys, and so prevent the kidneys from functioning normally would that cause headache?

A. Yes, sir.

Q. That is known as kidney headache.

A. Yes, sir.

Q. Suppose that the vertebrae were out of alignment pressing upon the nerves going to the liver, preventing a normal flow of nervous energy to the liver, which doesn't function normally, state whether that would produce headache?

A. That would be known as a liver headache, ordinarily.

Q. There may also be a lumbar headache, may there not?

A. There might.

Q. Where the bowels were not working normally—not functioning normally?

A. Exactly.

Q. If the Chiropractor found that one of the vertebra of the spine in the lumbar region was out of alignment, pressing upon one of these nerves, preventing the normal flow of nervous energy to the bowels, what would be the condition of the bowels as regards constipation?

A. Did I understand that is the Chiropractor corrected—

Q. No; if he found that one of the vertebrae was out of alignment in the lumbar region.

A. That would cause, often does cause, what is known as constipation.

Q. Would that cause headaches?

A. Oh, yes, very often.

Q. Would the fact that the kidneys were not functioning right, normally, cause a tired feeling?

A. Yes, sir.

Q. Would the fact that the stomach was not functioning normally cause a tired feeling?

A. It would.

Q. Would the fact that the liver was not functioning normally cause a tired feeling?

A. It would.

Q. If the stomach or the liver were not functioning normally would that cause dizziness?

A. It very often does.

Q. According to the Chiropractic theory would any toxic condition cause any trouble with the eyesight, or the nerve of vision?

A. It would.

Q. Assuming that a man came to you and employed you as a Chiropractor and told you that he had dizzy spells, headaches—headaches particularly at the back of the head, and you palpated the spine and found that the fifth or seventh, or both of them—both of those vertebrae were out of alignment, to what would you normally ascribe those headaches and that dizziness?

A. The fifth or seventh thoracic?

Q. Thoracic.

A. To stomach or liver trouble.

Q. Would the symptoms of vomiting cause you to change your diagnosis or your idea as to what was wrong with the patient? The fact that he, additionally, vomited?

A. It wouldn't cause me to change my idea.

Q. Assuming further that he decreased a little in weight; a man weighing 160 pounds decreased to 139 during some four months; would that cause you to change your opinion?

A. No. That is often accompanied by stomach and liver trouble.

Q. State whether the fact that the patient failed to respond immediately to these adjustments, would that cause you to change your mind?

A. Not necessarily.

Q. Why?

A. Because the severity of the nerve impingement and the density of the structures around it, through long continuation, would make it necessary to keep on adjusting.

Q. With regard to the theory of Chiropractic, assuming that the vertebra was out of alignment, pressing upon the nerve, preventing the normal flow of nervous energy to the liver or stomach, what would be the correct thing for the Chiropractor to do under those circumstances?

A. The correct thing to do would be to endeavor to adjust that part of the spine in which the pressure occurred.

Q. So that the vertebra would move back to normal alignment.

A. Yes, sir.

Q. And prevent the pressure upon the nerve.

A. Yes, sir.

Q. Now assuming further that a man came to you with headaches and dizziness and upon palpation of the spine you found that the second cervical vertebra was subluxated or out of alignment to the right, as a Chiropractor what normal conclusion would you draw as to that?

A. I would draw the conclusion, from this second neck vertebra being out of place, that the patient was suffering from, oh a number of troubles. There might be interference with the vision.

Q. Just explain why a headache, with the second cervical vertebrae.

A. Because at this particular point in the spinal column, namely at the second cervical vertebra, there is a little fine strand and net-work of fine fibres connecting directly with what we know as the cranial nerves, of which there are a dozen, for the sight, hearing, etc. And this very close connection between this network at the second cervical would cause headache.

Q. That is, the pressure on the nerve which emits from the second cervical.

A. Yes, sir.

Q. Going to those different parts of the head might easily cause headache, is that correct?

A. That is correct.

Q. Would you say that the proper thing for the Chiropractor to do would be to adjust the second cervical?

A. I would.

Q. How would you adjust it?

A. By moving it back into place.

Q. And when you move it into place can you hear it move?

A. Very often.

Q. Is that dangerous?

A. Not in the hands of a Chiropractor.

Q. Have you had a great many cases of headache come under your observation?

A. Oh yes.

Q. In the past ten years?

A. Yes, sir.

Q. What has been the result of Chiropractic adjustment?

A. Very excellent.

Q. Are the different members of the Chiropractic profession all supposed to follow and practice these principles you have testified to?

A. They are.

Q. And they are supposed to use them in their practice?

A. They are.

Q. As respects diagnosis?

A. Yes, sir.

Q. And as respects treatment?

A. Yes, sir.

Q. Does the science of allopathic medicine in its theory of diagnosis ever palpate the spine to find out whether the vertebra is out of alignment?

A. It does not.

Q. In your experience as an allopathic physician would you say that the failure of the allopathic physicians to use that method has resulted in their obtaining wrong diagnoses?

A. Their failure to use this method has often resulted in wrong diagnoses.

Q. Now then, assuming that the plaintiff, being a man of the age of 34 years, approximately weighing 160 pounds, should visit the defendant, who is a Chiropractor practicing the science of Chiropractic, and the patient complained of headache, having headache at the base of the skull, and some vomiting, some dizziness and blurred vision, and the Chiropractor upon examination of the spinal column of the patient found that the fifth and seventh dorsal were out of alignment and that the second cervical was out of alignment would you say that in attempting to put those vertebrae back into alignment and diagnosing the plaintiff's case as failure of function of the organs or tissues which the nerve of the fifth and the seventh dorsal went to, and which the nerve of the second cervical went to was the proper or improper method from the Chiropractic standpoint?

A. I should say it was the proper method.

Q. Would you say under those conditions it would have been the method which the average Chiropractor in the same kind of a city as this would use?

A. Absolutely the same method.

A. The same method of diagnosis?

A. Yes, sir.

Q. The same method of treatment?

A. The same method of adjustment.

Q. That of course would differ from the medical method.

A. That would differ from the medical method.

Q. Assuming that after the defendant found those conditions I have related, namely a subluxation of the fifth and seventh dorsal and the second cervical, and had related to him the symptoms which I have already stated, namely: Loss of appetite, some

vomiting, some headache—stabbing headache—dizziness, loss of weight, would you say that the Chiropractor did an improper act, according to what the ordinary Chiropractor in the same or similar localities under the same or similar circumstances would do by not diagnosing the complaint as tumor of the brain?

MR. BAKER: Objected to.

Objection sustained. Exception.

Q. Assuming that the plaintiff went to the defendant and that there was stated the fact that he had no appetite, had stabbing headaches, some vomiting, slight blurred vision, and the Chiropractor found upon examination the fifth and seventh dorsal was out of alignment, and the second cervical was out of alignment, state whether or not the defendant in diagnosing this ailment of the plaintiff as stomach trouble or impingement of the nerves going to the stomach or liver, used that degree of care, skill, diligence and knowledge as is ordinarily possessed by Chiropractors in the same or similar localities under the same or similar circumstances.

A. Yes, he did.

CROSS EXAMINATION: By Mr. Baker:

Q. Where do you reside?

A. In Chicago.

Q. What is your address in Chicago?

A. 20 North Ashland Boulevard.

Q. How long have you lived there?

A. You mean my residence address?

Q. Yes.

A. 999 Lake Shore Drive. I gave you my office address.

Q. What school, medical college, did you graduate from?

A. Rush Medical College.

Q. What year?

A. 1897.

Q. How long have you followed Chiropractic?

A. 12 years.

Q. Do Chiropractors profess to cure diseases?

A. No.

Q. They make no pretense of being able to cure diseases, do they?

A. No; they adjust the cause.

Q. They adjust the backbone and leave the rest to fate, and God and good luck.

A. They adjust the back bone.

Q. Without any definite knowledge that they are going to cure or not. Is that their position?

A. They, quite as much as the rest of the healing art schools.

Q. I am speaking about the Chiropractor; when they adjust the back bone and give these treatments they have no definite knowledge whether they will cure or not, have they?

A. As much as any doctor can have.

Q. Will you answer the question as to Chiropractors? Do they have any definite knowledge whether they will cure or not? Answer Yes or No.

A. No.

Q. Can you cure disease unless you know the cause of the disease?

A. If by "disease" is meant a certain symptom complex you can alleviate that symptom complex.

Q. Well, if you know the symptoms manifested by a person in a diseased state do you not first have to know the cause of those symptoms—what causes the symptoms—before you can apply the cure?

A. You should.

Q. Isn't it absolutely necessary to know the cause before you can effect a cure?

A. It is necessary to an exact knowledge, but it is not always the case.

Q. It is necessary to have an exact knowledge.

A. To an exact knowledge, or form an exact knowledge of a case.

Q. Is it not known that certain causes will always produce certain effects?

A. Broadly speaking, that is so.

Q. If you know the manifestations of a disease then are you not able to know the disease?

A. Yes.

Q. Under your system of practice if a man had a headache you would say the cause was the impingement of certain nerves in certain vertebra.

A. Yes, sir.

Q. Is that what you mean?

A. Generally speaking.

Q. I so understood your testimony. And you have referred to certain vertebrae, if they were out of alignment or if there was an impingement upon the nerve, then the headache would follow. And what vertebrae do you say those were?

A. Do you refer to the vertebrae which were mentioned?

Q. Yes, which you mentioned, and which will cause a headache.

A. The fifth thoracic, the seventh thoracic and the second cervical were mentioned.

Q. If you find a man complaining with headache—

MR. HOLMES: (Interrupting) That is not the question. He asked you: How many vertebrae out of alignment will cause headache.

A. I could include several others. For instance, the tenth or eleventh thoracic.

Q. We will take any vertebra for the purpose of illustration. You say the second cervical will cause a headache?

A. Yes, sir.

Q. If a man came to you complaining of headache and you found the second cervical out of alignment then you would at once say that was the cause of his headache, would you?

A. I would, after due, repeated examination and observation.

Q. Now if the second cervical vertebra being out of alignment and impinging a nerve will cause headache, and the man has a headache, don't you have to know then each and every vertebra being out of alignment which will cause headache?

A. You would have to know the relation of each vertebra to the vertebra above and below, in order to know. There are relative mal-alignments, and relative severities. You might make up your mind after repeated observation that a particular headache was due to a mal-alignment of the tenth thoracic. That is the reason I say "repeated observation."

Q. Well, the man doesn't get the headache as the direct, immediate result of the vertebra being out of alignment, does he, under your theory?

A. Yes, the mal-alignment is the cause.

Q. The direct cause of the headache.

A. Yes, sir.

Q. Well, you have answered that a man has a headache resulting from functional disorders in the stomach, the kidneys, the liver, and several other organs that you mentioned in response to Mr. Holmes. Now must there be an impingement of some nerve that feeds each and every one of those organs in order to have a headache resulting from some functional disorder?

A. Not in any one case.

Q. If you found the second cervical vertebra out of alignment would you know that the man's headache was the result of kidney disease?

A. I would determine that by the length of the mal-alignment—the length of time the man has been suffering, the severity, the position; in other words, a number of factors would enter into the case.

Q. Would you be able to say that his kidney trouble causing the headache was the result of a certain vertebra being out of alignment?

A. I would, after observation.

Q. Then would the same vertebra being out of alignment cause the functional disorder in the liver?

A. The *same* vertebra?

Q. Yes.

A. You spoke of kidney trouble.

Q. You answered in reference to the kidney. Now headache may be caused by different disorders, and the disorders are all caused, under your theory, by certain nerves being impinged upon by reason of the vertebra being out of alignment. That is your theory?

A. Yes, sir.

Q. Then would the same vertebra being out of alignment cause the functional disorder in the liver?

A. Not necessarily the same vertebra.

Q. Would different vertebrae have to be out of alignment in order to cause different disorders in the human body?

A. Yes, sir.

Q. Now then if you, as a chiropractor, found certain vertebrae out of order which you say would make headache which was the result of stomach trouble, and you put the vertebra in proper align, and the patient continued to have the headache, would you feel that you had diagnosed the cause of the headache properly?

A. That would depend upon the case.

Q. It all depends upon the case, doesn't it?

A. The length of time.

Q. Is it the theory of Chiropractic that all disease is the result of impingement upon the nerves in the vertebra?

A. Practically all disease, except that which would result to distal parts, to injuries.

Q. So that if there was some functional disorder of the kidneys or liver the Chiropractor would expect to find upon examination of the spinal column certain vertebrae so misplaced as to impinge upon nerves that furnish the nerve force to these organs.

A. Yes, sir.

Q. If there was a functional disturbance or disorder in the kidneys or liver that might produce dizziness, or headache or vomiting, as occurred in this case.

A. Yes, sir.

Q. You are a graduate of Rush Medical College, are you?

A. I am.

Q. You know at least from your studies in the College as a student of medicine and surgery that tumor in the brain is a well known disease, do you not?

A. Not well recognized or well known disease.

Q. Tumor in the brain?

A. It is a rare disease.

Q. A rare disease in the medical profession?

A. Yes, sir.

Q. Are tumors rare in the human being?

A. Tumors of the brain are very rare.

Q. There are many works written upon tumors of the brain, aren't there?

A. Not as many as in relation to other parts of the body.

Q. Do you not know that at the Mayo Brothers Hospital they are treating tumors of the brain almost daily?

A. Mayo Brothers is a very highly specialized place, and they would naturally gravitate to Mayo Brothers, all that there were, almost.

Q. Do you know that at Mayo Brothers they are performing operations and curing human beings who are suffering from that disease?

A. I don't know that they are curing any considerable percentage of those operated upon. I don't think they do.

Q. A tumor in the brain is not resultant from any impingement of nerves in the spinal column, is it?

A. It might, conceivably, be so.

Q. In what way would you say an impingement of the nerve in the spinal column would cause tumor in the brain?

A. In this way: That the pressure upon the brain tissue is

very much influenced through nerves going from certain parts of the vertebrae indirectly so as to bring about an ebb and time, a high and low pressure upon the brain tissue itself, to the extent of starting trouble in the brain.

Q. Do you know impingement of what vertebra will cause tumor in the brain?

A. I would say the vertebrae in connection with what is known as the superior ganglia; in other words, the second, third and fourth cervical vertebrae.

Q. Do you know that the tumor in the brain will cause severe headache and vomiting and dizziness in these patients?

A. Those are the early symptoms.

Q. And those are marked symptoms, well known to the medical profession?

A. Not marked symptoms of tumor of the brain.

Q. The headache resulting from tumor is not caused by any impingement in the vertebra, is it?

A. Most assuredly, indirectly.

Q. How so? How is the headache which is the result of tumor in the brain caused by an impingement of any one of the vertebrae?

A. In this way: That a long standing impingement may be a causative factor in starting the trouble in the brain, from whence the tumor would develop; and so the presence of the tumor, and the resultant headache, would of course be traceable to that impingement.

Q. Isn't the headache caused by the pressure in the brain of the growth?

A. Brought about by the impingement which started the growth in the brain.

Q. So that the Chiropractor would say that the impingement was the direct cause of the tumor.

A. He would.

Q. And therefore if he would adjust the spinal column he would relieve the tumor, or the result of the tumor.

A. That would be his theory.

Q. Now the fact is well known is it not in the medical profession that a tumor may be caused not only by traumatism, head injuries, a blow upon the brain, but it may be caused by a syphilitic and by other causes where there might not be any vertebrae out of alignment at all.

A. I excepted injuries, direct injuries, from that theory.

Q. Have you read Church & Peterson on nervous and mental diseases?

A. I have looked in it. I haven't read in it for a long time.

Q. That is known as a standard in the profession, is it not?

A. I think it is, in the medical profession.

MR. HOLMES: The allopathic profession.

A. Yes.

Q. Do you know who Oppenheim is in the medical profession?

A. As I remember there are several Oppenheims. I would not know which one you refer to.

Q. Have you read the statement of Church and Peterson that Oppenheim states that good results have been obtained in about one-half of well selected cases—referring to surgical proceedings in the hands of competent men—has secured some very good results and saved and prolonged life?

A. In tumors of the brain?

Q. Yes.

A. I should say that was rather an over-statement as to percentage.

Q. Would you disagree with this statement: "Even in inoperable tumors a wide opening of the skull has relieved pressure, has benefited the mental condition, stopped headaches and caused the choked disc to subside." You will agree that is the result of operations on the skull when there is a brain tumor, will you not?

A. Knowing the troubles that come to a patient——

Q. (Interrupting) The question is whether you disagree with this writer?

Q. Do you know that there have been complete recoveries from brain tumor when the operation has been taken in time, in the early stages of the growth of the tumor?

A. I haven't seen any.

Q. You haven't read about such recoveries?

A. Yes, I have read about such recoveries.

Q. Church. & Peterson quote Froquet as saying that in the study of 116 operations of recent date he draws the following data: Recovery, 15 per cent; improved 28 per cent; unimproved 15 per cent; mortality 42 per cent, as the result of operations. From your experience do you believe that statement, that 15 per cent recover entirely by an operation is well stated?

A. Not from my experience, but I wouldn't doubt the statistics of reputable men.

Q. Before you took up the idea of Chiropractic instead of the other school did you have any experience in treating brain tumors?

A. Not much.

Q. Did you ever attend any of the hospital clinics where they have removed brain tumors?

A. Yes, sir.

Q. Do you know as a matter of fact that the surgeon can remove the tumor at certain stages of the disease.

A. Yes, sir.

Q. And at other stages of the disease it is impossible to remove the tumor because the tumor has infiltrated.

A. Yes, sir.

Q. Grown into the brain.

A. Yes, sir.

Q. And that condition can only be known and ascertained upon opening up the skull. That is the fact, isn't it that the surgeon, until he opens up the skull cannot tell whether the growth has been of such duration and extent as to prevent operation?

A. I can conceivably see where a surgeon would open the skull that purpose provided there are certain pressing symptoms to make it desirable for the patient to take that one chance in three or four.

Q. You have observed Mr. Kuechler in the court room. You have observed his skull. You observe now the condition of his skull.

A. Yes, I see a protuberance there.

Q. That is caused, is it not, by the pressing out of the brain tissue by reason of the tumor in the brain?

A. Without having examined I should say that it was caused by a hernial protuberance.

RE DIRECT EXAMINATION by Mr. Holmes:

Q. You graduated in 1897?

A. Yes, sir.

Q. In the twenty-five years you have been in practice how many brain tumors have come under your observation?

A. I have naturally thought about it a good deal this morning, this being such a case, and if my memory serves me right I have seen four, possibly five, come under my observation.

Q. What would you say would be the percentage per population, per one hundred thousand?

Objected to as incompetent, irrelevant and immaterial. Objection sustained. Exception.

Q. In your opinion state whether it is a rare or a common disease.

A. A very rare trouble.

Q. You have been cross examined considerably upon the question of Chiropractic not curing. Please explain to the jury what you mean by that, that Chiropractors do not cure—that part of the theory that they do not cure.

A. That should be explained like this: That all organs and all tissues of the body being absolutely dead without nerve impulses or nervous energy going to them regularly, at all times, then the idea of Chiropractic is to keep that nervous energy flow-

ing to all those organs and tissues, and not mind or take into consideration so much what happens in the distant parts, but rather at the center, at the point where this impulse is held back from reaching those distant parts. That is what the Chiropractor means when he says he adjusts the cause, not treating the distal organs.

Q. When the Chiropractor puts the vertebrae into alignment and allows the normal flow of nervous energy does he consider that these organs then function normally, and that he has cured or that nature has cured?

A. The Chiropractor generally speaks of nature taking care of itself if it has a chance for unimpeded flow of nervous energy.

CHAPTER VIII.

NEGLIGENCE

All of the foregoing chapters were written to explain the relationship that exists between the Chiropractor and the patient, that is when the Chiropractor is employed. This relationship showed the duty which the specialist owed his patient, the duty the ordinary Chiropractor owed his patient, the duty the allopath M. D. owed his patient, the duty the mixer owed his patient. These chapters on "duty" were important because duty is the foundation of all negligence. Negligence in its civil relations, is such an inadvertant imperfection by a responsible human agent, in the discharge of a legal *duty*, as produces in an ordinary and natural sequence, a damage to another.

F. Wharton Law of Negligence, Book I, Chap. I.

There will soon be pointed out the difference between the negligence that a physician may be guilty of in treating and also the negligence the physician may be guilty of in diagnosis.

The definition of negligence of a physician in treating is as follows:

"Negligence" by a physician consists in doing something which he should not have done in the treatment of a case, or in omitting to do something he should have done." *McGraw vs. Kerr*, 128 P. 870; 23 Colo. App. 163.

Negligence in diagnosis would be defined as follows: Negligence (in diagnosis) by a physician consists in doing something which he should not have done in the diagnosis of a case, or in omitting to do something he should have done.

The Chiropractor or practitioner may be liable in any one of the following ways:

First—The Chiropractor may not possess the reasonable de-

gree of learning possessed by the ordinary Chiropractor practicing in the same or similar locality for the purpose of treatment in light of the present state of the Chiropractic Science. The lack of this knowledge is negligence.

The science of Chiropractic is advancing and with the development of the science comes the added responsibilities. Because of the wonderful success of Chiropractic, more and more difficult cases are daily being brought to the attention of the Chiropractor and with this attitude of the public there is a demand that a man know his business. The writer has met and defended men who called themselves Chiropractors who did not know the principles of Chiropractic. They did not know the Chiropractic theory of disease. They did not know the anatomy of the nerves, the anatomy of the spine; they did not know nerve tracing. They did not know the theory of the proper methods of adjustment. These men did not possess even the rudimentary knowledge of Chiropractic. But the Chiropractor must possess more than that, he must possess the reasonable degree of learning possessed by ordinary Chiropractors and the failure to possess that knowledge is negligence. For instance, one Chiropractor was asked on the stand for the theory of Chiropractic regarding anabolism. He did not know and the jury was immediately prejudiced against him.

Second—The Chiropractor may not possess the SKILL possessed by the ordinary Chiropractor practicing in the same or similar locality for the purpose of treatment in light of the present state of the Chiropractic science. The lack of this SKILL is negligence.

I wonder if Chiropractors really understand how many Chiropractors in the field really lack the skill of the ordinary Chiropractor. First there is the skill required in palpating, nerve tracing and adjusting. Twenty years of experience has shown that some are more adaptive to nerve tracing and palpation than others. It is astonishingly true that many Chiropractors are deficient in palpation and nerve tracing. These Chiropractors should

return to a good school and not leave it until they have mastered the subject. The same may be said of adjustment. Some adjust lightly, some hard, and many use the wrong method. One patient in a malpractice case testified that the wife of the Chiropractor assisted in the adjustment, one working the legs and the other the back bone.

The long and short of it all is that these kind of Chiropractors are unskillful and they are liable for malpractice suits. Those Chiropractors who are deficient in the art of adjusting should return to some good school and learn it right, for if the Chiropractor does not possess that requisite skill it becomes negligence.

Third—The Chiropractor may fail to use the reasonable degree of learning possessed by the ordinary Chiropractor practicing in the same or similar localities for the purpose of treatment in light of the present state of the Chiropractic science. The failure to use that knowledge is negligence.

The Chiropractor must bear in mind here that there is a difference between possessing a reasonable degree of learning and using it. Remember that when a patient comes to you for Chiropractic adjustments, he wants you to find out what is the matter with him from the Chiropractic theory of disease and not according to the Christian Science, or the eclectic or the allopathic system. You must use your Chiropractic knowledge, keep it sharpened like a knife ready for use. You may know certain principles of nerve tracing and not use it. That is negligence. You may know certain principles of palpation and not use it. That is negligence. You may know the approved methods of reading X ray Spinographs and not use it. That is negligence. You may know certain proper methods of adjustment and postures and fail to use it. That alone is negligence.

Fourth—The Chiropractor may fail to use the skill used by the ordinary Chiropractor practicing in the same or similar localities for the purpose of treatment in light of the present state of the Chiropractic science. The failure to use that skill is negligence.

The last and most important part of this group is to use your skill properly. Assuming that you have the skill possessed by the ordinary Chiropractor, it is your duty to use it. You must give each patient your undivided attention when palpating, nerve tracing or adjusting. You must concentrate on it and give every patient your best palpation, your best adjustment. If you make a careless palpation that is negligence. If you make a careless reading of an X ray Spinograph that is negligence. If you make a careless adjustment that is negligence. This sort of negligence is unforgivable for it means that you have the skill but you have just failed to use it.

It may be of interest to the men who have graduated a great many years ago to know that so far as malpractice is concerned they must keep up to the present state of the Chiropractic science and that they must keep in touch with the new developments which are daily taking place because the standard which they must exercise is measured by the standard of the ordinary Chiropractor in the light of the present state of Chiropractic science. That being true, the spinograph has now become generally and universally used by the ordinary Chiropractor, therefore it may be negligence not to use the spinograph and the Chiropractor will be liable if injury should result.

The same may be said of the new Palmer posture in adjusting. For instance, the writer's attention was called to the case of a young Chiropractor who had a woman come to him with prolapsus of the uterus. She had had several abdominal operations and the healed uterus gave her trouble when she laid down on the divided bench but the Chiropractor found that by putting her in a new posture with knees on the floor and chest on the table it did not hurt her at all.

The writer has heard of a great many cases of people who having had abdominal operations found the Palmer posture much better than the divided bench. For instance, the schools now advise Chiropractors to adjust all cases of pregnancy with the Palmer posture because under the old method of lying prone on

the divided bench there was some element of risk, but in the Palmer posture there is no risk. That is merely given as an illustration of some of the things that the older Chiropractor should keep up with and know and he must improve himself by adopting the best methods and when he sets out to get these he should be sure too that he gets them right at first hand if possible.

From a careful reading of the cases the apparent reason why the practitioner's treatment should be judged by the practitioner's own system or method of treatment, is because that is the kind of treatment he undertakes to give and all that he should be held responsible for.

There are many cases dealing with the treatment of cases by different schools, but the question of diagnosis is very much closer.

For instance, the diagnosis by the allopath physician is practically the same as the diagnosis by the homeopathic physician. Where this appears a physician of one school as well as another could testify as to the correct diagnosis or ailment of the patient. A homeopathic physician could testify where an allopath physician was being sued and an allopath physician could testify where a homeopathic physician was being sued.

The rule might be stated thus: "That where different schools use the same methods of diagnosis then any member of those different schools could testify as to what in their opinion ailed the patient. The subsequent conclusion to be drawn is that where the different schools use the same methods of diagnosis that the testimony of any member of such different schools could be introduced to show negligence, and the degree of cure required would be measured by the ordinary practitioner of all of such schools combined.

The following case, which is one where a homeopath was being sued, illustrates that point.

That the witness belonged to a different school of medicine did not disqualify him from expressing an opinion as to what ailed the patient. Methods of diagnosis do not differ in the different

schools and this appeared from the subsequent examination of the witness. Moreover Section 2576 of the Code, in providing for the issuance of licenses to practice medicine, exacts that each candidate for examination in any school of medicine shall be given the same set of questions "covering anatomy, physiology, general chemistry, pathology, surgery and obstetrics," and these subjects are taught by the same teachers to students of the several recognized schools of medicine. In materia medica, therapeutics and the principles and practice of medicine, a set of questions is used corresponding to the school of medicine which the applicant desires to practice. As to these latter subjects the competency of the witness was not shown, for medicines and methods of using them differ somewhat in different schools. But the science of pathology is common to both schools with nothing peculiar to either, and therefore the witness should have been allowed to answer.

Van Sickle vs. Doolittle, 155 N. W. 1007.

However, the reader will see that it would be unfair for the member of one school to testify that the treatment of the other school was improper because each school thinks the other is wrong anyway. This is especially due to the difference in treatment. The allopath physician has often attempted to testify against the osteopath or homeopath but the following case is one where the homeopath attempted to testify against the allopath treatment.

Read the case carefully and you will see the need of keeping the distinction between Chiropractic and allopathic medicine. As long as you stick to straight Chiropractic you are all right.

You will notice in the following case the homeopath testifies that he treats symptoms not disease. According to this he seems farther away from the real cause of disease than ever. Add to this the further statement that their system was to administer small doses that would never produce physiological effect and you can see why the allopathics are swallowing them up and how in a few years "homeopathy" may be but a memory.

Van Sickle vs. Doolittle, 169 N. W. p. 14.

The objection should have been sustained. The physician merely gave his opinion as to what treatment should have been given according to the allopathic school of medicine. Notwithstanding his expressed ignorance of the homeopathic way, he was allowed to answer. The error is the more apparent from the testimony of defendant and Dr. Hanchette, a physician of the homeopathic school of 28 years' experience. The latter testified that homeopaths treated, not disease, but for conditions or symptoms of diseases; that their system was to administer small doses that would never produce physiological effect; that they take the totality of symptoms and treat the symptoms in a disease. In calling a physician, a person is presumed to elect that the treatment shall be according to the system or school of medicine to which such physician belongs, and it would be unfair to measure such treatment by any other than the standards of such school, and the law will not tolerate testing treatment according to one school by the standards of another. That was precisely what was undertaken, and the objections should have been sustained.

The same witness was asked:

"What would you say as to whether or not the treatment that this child received was that ordinary skill which physicians and surgeons practicing in Hawarden, Iowa, or similar localities, in September, 1911, exercised?"

This was objected to as calling for opinion of witness who had not shown himself competent to speak of homeopathic method of practice and to give his conclusion as to the ordinary skill exercised by physicians in different places. The objection should have been sustained. The doctor was not shown to be familiar with the degree of skill exercised in such localities, nor does it appear that he had any knowledge of what would constitute average skill on the part of a homeopathic physician. Moreover, this was not a matter of expert testimony. From the facts proven, the jury only might deduce the conclusion called for.

The physician was then asked: "Whether, in your opinion,

the treatment given by Dr. Doolittle is such as a physician would have given in the same circumstances?"

The same objection was interposed and should have been sustained. Plainly this was not a subject of expert testimony. The deduction was one for the jury to draw from all the evidence in the case. Not only did it call for a conclusion involving knowledge which the witness had disclaimed possessing—that is, concerning homeopathic methods of treatment—but such a conclusion of ultimate fact as the jury must have based the finding on the matters and things recited in the hypothetical question.

Sometimes the tables get turned around and the allopath physicians are sued for malpractice and the homeopath physician wanted to testify against the allopath.

This is what happened in the case of *Morten vs. Courtenay*, a Minnesota case in 77 Northwestern, p. 813.

"The plaintiff next called as an expert witness Dr. Gray, a physician and surgeon belonging to what is known as the homeopathic school of medicine, and proposed to have him give his opinion, based upon the plaintiff's testimony, whether defendant's treatment of the case was proper. Defendant belongs to what is known as the allopathic or regular school of medicine, and was entitled to have his treatment tested by the rules and principles of that school, and not of some other school. *Nelson vs. Harrington*, 72 Wis. 591, 40 N. W. 228; *Patten vs. Wiggin*, 51 Me. 595. Objection having been made on this ground to the competency of Dr. Gray as an expert, he, on his preliminary examination, testified that there was a decided difference between the rules and principles of the two schools as respects the "practice of medicine", but not as respects surgery. When inquired of as to whether the two schools differed as to their treatment of sepsis, his testimony was, as nearly as we can understand it, that they have the same rules in regard to the treatment of sepsis connected with surgery; but, where the condition of sepsis has developed a diseased condition, it becomes a question of disease, and not surgery, and in such case the rules of treatment of the two schools of medicine would be

entirely different. Upon the question of Dr. Gray's competency defendant's counsel offered to introduce other professional testimony to show that the two schools are hostile to each other in their rules as to the treatment of sepsis, even in cases connected with surgery. The court excluded this evidence, and permitted Dr. Gray to testify as an expert, saying that perhaps the offered evidence might be admitted later.

We think this was error. The question of the competency of the witness to testify as an expert was one for the court, and not for the jury, and the defendant should have been permitted to present to the court on the preliminary examination all competent evidence on the question. The competency of the witness did not depend wholly upon his knowledge or skill as a physician and surgeon, but also upon the question whether he would apply the correct rules and principles in giving his opinion as to the defendant's treatment of the deceased. It is true that the witness testified that his "course of instruction had compassed the field of the allopathic course of study," but this would not help matters if he applied the wrong rules and principles to defendant's treatment. He may have, and probably did, give his testimony as to the propriety of this treatment upon the assumption that the rules and principles of the two schools were the same in a case of sepsis connected with surgery; but, if he was mistaken in this assumption, he would be testing defendant's treatment by a wrong standard.

Expert evidence is at best very unsatisfactory, and is resorted to only from necessity; and, without intending to disparage a profession which contains so many eminent men of the highest skill and integrity, we are justified in saying that it is a matter of common knowledge that in almost every case requiring medical expert evidence witnesses can be found who will give opinions directly opposed to each other. A physician or surgeon is not an insurer that he will effect a cure. Neither is he required to come up to the highest standard of skill known to the profession. When he accepts professional employment, he is only bound to exercise

such reasonable care and skill as is usually exercised by physicians or surgeons in good standing of the same school of practice. And where any person claims a cause of action for neglect to exercise the required degree of care or skill, the burden is upon him to prove such neglect.

Getchell vs. Hill, 21 Minn. 464.

Because of the fact that physicians and surgeons for many hundreds of years have known the impossibility of curing all the afflicted by any system there has grown up in the law a provision that the physician in the absence of an express contract does not warrant a cure.

Now every proposition in law has as in geometry its converse proposition. This converse proposition is this: The fact that a physician does not cure does not mean necessarily that the defendant physician has been negligent. This is illustrated by the following extract. In other words, failure to cure is not evidence of negligence.

In *Stalock vs. Holm*, 111 N. W. 264; 100 Minn. 276, the court says: "If the maxim *res ipsa loquitur* were applicable, * * * and a failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art; for they would have to assume financial liability for nearly all the 'ills that flesh is heir to.' If apart from the fact of death, there is no liability—and that is the conclusion in this case—that fact does not create it."

It was frequently been held that any physician is negligent if he omits to inform himself as to the facts and circumstances of the case. In the Chiropractic Art, Science and Philosophy this would be the failure especially to detect subluxations.

Along the same line it is further held that the practitioner is negligent if he does not possess the knowledge, experience or skill which he professes to have. A failure to detect subluxations if caused thereby would be negligence.

The courts have made some distinction between mistake or

error in judgment and negligence. The following case, *Stalock vs. Holm*, 111 N. W. 264, presents that matter fully as well as other matters of negligence.

Stalock vs. Holm, et al. 111 N. W. Rep. 264.

The principles of law applicable to such a state of facts are clear and well settled. In an ordinary action for negligence, that a man has acted according to his best judgment is no defense. The standard of careful conduct is not the opinion of the individual, but is the conduct of an ordinarily prudent man under the circumstances. In the leading case of *Vaughn vs. Menlove*, 3 Bing. (N. S.) 468, 474, Tindall, C. J., said that to hold otherwise "would leave so vague a line as to afford no rule at all; the degree of judgment belonging to each individual being infinitely various." With respect to matters resting upon pure theory, judgment and opinion, however, there is a generally recognized variation from this sound general principle. "The distinction between an error of judgment and negligence is not easily determined. It would seem, however, that if one, assuming a responsibility as an expert, possesses a knowledge of the facts and circumstances connected with the duty he is about to perform, and brings to bear all his professed experience and skill, weighs those facts and circumstances, and decides upon a course of action which he faithfully attempts to carry out; then want of success, if due to such course of action, would be due to error of judgment, and not to negligence. But if he omits to inform himself as to the facts and circumstances, or does not possess the knowledge, experience or skill which he professes, then a failure, if caused thereby, would be negligence." *The Tom Lysle* (D. C.) 48 Fed. 690, 693. Cases of malpractice may be within the exception. A physician entitled to practice his profession, possessing the requisite qualifications, and applying his skill and judgment with due care, is not ordinarily liable for damages consequent upon an honest mistake or an error of judgment. in making a diagnosis, in prescribing treatment, or in determining upon an operation, where there is reasonable doubt as to the nature of the physical conditions involved or

as to what should have been done, in accordance with recognized authority and good current practice.

Another justification for the exception lies in the nature of the undertaking. Most professional men are retained or employed in order that they may give the benefit of their peculiar and individual judgment and skill. A lawyer, for example, does not contract to win a law suit, but to give his best opinion and ability. He has never been held to liability in damages for a failure to determine disputed questions of law in accordance with their final decision by courts of appeal. It would be just as unreasonable to hold a physician responsible for an honest error of judgment on so uncertain problems as are presented in surgery and medicine. Indeed, the peculiarities of the subject matter with which medical men deal constitute another abundant justification for the exception. Those peculiarities concern, in the first place, the constitution of the human mind and body, and, in the second place, the nature of his science itself. On the human subject matter with which physicians have to do, the remarks of Woodward, J., in *McCandless vs. McWha*, 25 Pa. 951, have become classical. *Smother vs. Hanks*, 34 Iowa, 286; 11 Am. Rep. 141. Judge Upton has, however, improved them: "The surgeon does not deal with inanimate or insensate matter like the stone mason or bricklayer, who can choose his materials and adjust them according to mathematical lines, but he has a suffering human being to treat, a nervous system to tranquilize, and an excited will to regulate and control. Where a surgeon undertakes to treat a fractured limb, he has not only to apply the known facts and theoretical knowledge of his science, but he may have to contend with very many powerful and hidden influences; such as want of vital force, habit of life, hereditary disease, the state of the climate. These or the mental state of his patient may often render the management of a surgical case difficult, doubtful and dangerous; and may have greater influence in the result than all the surgeon may be able to accomplish, even with the best skill and care."

William vs. Poppleton, 3 Or. 139, 147.

In the question of diagnosis, which in ordinary language is to find out what is wrong with the patient, there is often a question of judgment on the part of the practitioner. In other words, from all the experience of the medical profession there has never been developed or established an infallible method of diagnosis in all diseases, although this is claimed in some diseases. For that reason, practitioners must often use their own judgment. Along in this connection the same rule applies that the mere fact that the practitioner failed to diagnose correctly does not establish lack of care on the part of the practitioner, and if the practitioner does exercise ordinary care he is not liable for a mistake in judgment. On the other hand, the failure to possess and use a reasonable degree of learning and skill would be negligence itself and therefore the courts have added the additional rule or corollary to the rule of "mistake in judgment", which is this, that if the error or mistake in judgment is so gross as to be inconsistent with that degree of skill which it is the duty of the practitioner to possess, then the practitioner is liable. This is illustrated by the following citations:

Craig vs. Chambers, 26 Am. St. Rep. 389; 17 Ohio St. 253.

Sims vs. Parker, 41 Ill. App. 284.

It has also been held that the fact that a physician fails to discover a fracture or dislocation, does not alone establish or raise a presumption of want of care on his part.

Richards vs. Willard, 176 Pa. 181; 35 Atl. 114.

James vs. Crockrey, 34 N. B. 540.

Where a physician exercises ordinary care and skill, keeping within recognized and approved methods, he is not liable for the result of a mere mistake of judgment.

A physician is liable for the result of error of judgment where the error is so gross as to be inconsistent with that degree of skill which is the duty of a physician to possess.

West vs. Martin, 31 Mo. 375; 80 Am. Dec. 107.

Johnson vs. Winston, (Neb.) 94 N. W. 607.

Again it should be noted that mistake in judgment only excuses the practitioner where there is reasonable doubt as to nature of the physical conditions involved or as to what should have been done in accordance with recognized authority and good current practice.

The first case is where there is reasonable doubt as to the nature of the physical conditions. Cases of this kind are where the nature of the physical conditions are so hidden, or are not apparent or are mixed up with other conditions that there is reasonable doubt as to the real nature of the physical conditions.

As the theory of diagnosis of most systems depends entirely on the nature of the physical conditions, then if there is reasonable doubt as to the nature of the physical symptoms, then there must also be reasonable doubt of the diagnosis and the practitioner would not be liable for honest mistake.

The second proposition is slightly different. Assuming that the practitioner knew the nature of the physical conditions, then if there is reasonable doubt as to what the diagnosis would be in accordance with recognized authority then of course there would be no harm for the practitioner to guess if even the recognized authority would have to guess.

Or, on the other hand, if according to good current practice there would have to be a guess as to the diagnosis the practitioner would not be liable if he guessed and made an honest mistake. It must be borne in mind that the practitioner's duty, however, is to collect all the physical facts from which he is to determine what is wrong according to his system of practice, and the practitioner must also possess the requisite qualifications to guess and exercise those qualifications.

The following citation from the courts explains this position:

HONEST MISTAKE

It is now well settled that a physician is entitled to practice his profession possessing the requisite qualifications and applying

his skill and judgment with due care and is not ordinarily liable for damages consequent upon an honest mistake or an error in judgment in making the diagnosis, in prescribing treatment, or in determining upon an operation, where there is reasonable doubt as to the nature of the physical conditions involved, or as to what should have been done in accordance with recognized authority and good current practice.

30 Cyc. 1578.

Merriam vs. Hamilton, 64 Ore, 476; 130 Pac. 406.

Wells vs. Terry Baker Lumber Co., 57 Wash. 658; 107 Pac. 869; 29 L. R. A. (N. S.) 426.

Coombs vs. James, 82 Wash. 403; 114 Pac. 536.

Lorenz vs. Booth, 147 Pac. 31.

Harriott vs. Plumpton, 44 N. E. 992; 166 Mass. 585.

There can be no error of judgment, of course, until the practitioner has collected the data on which to base that data and if the practitioner is negligent in collecting the data, then of course his failure to come to the right conclusion would not be based upon an error in judgment but upon negligence in failure to collect the data upon which the judgment was to be made.

That is clearly illustrated in the following decision.

There is a fundamental difference in malpractice cases between mere errors of judgment and negligence in previously collecting data essential to a proper conclusion. If he fails to inform himself of the facts and circumstances and injury results therefrom, he is liable. Citing 30 Cyc. 1579:

Staloch vs. Holm, 100 Minn. 276; 111 N. W. 264; 9 L. R. A. (N. S.) 712.

Johnson vs. Winston, 69 Neb. 425; 94 N. W. 607.

The following case is a very good example of a case of where the practitioner failed to use due care to ascertain the physical facts. The Chiropractor is bound by the same rules. He must ascertain the subluxations of the spine if he is employed for diagnosis and treatment.

McKerson vs. Gernish, 114 Me. 554; 96 A. T. L. 235.

Plaintiff broke both bones in leg and went to defendant physician who pronounced it a sprain. Damages, \$5,000.

The Court says: The principles of law applicable to the case are well established and not in dispute. A physician impliedly agrees with his patient that he possess that reasonable degree of learning and skill in his profession which is ordinarily possessed by other physicians under like conditions, that he will use his best skill and judgment in diagnosing his patient's disease or ailment and in determining the best mode of treatment and that he will exercise reasonable care and diligence in the treatment of the case.

Patten vs. Wiggin, 51 Me. 594; 81 Am. Dec. 593.

Cyford vs. Wilbur, 86 Me. 414; 29 Atl. 1117.

Ramsdell vs. Grady, 97 Me. 319; 54 Atl. 763.

In this case the defendant used only manipulation to determine whether there was a fracture or a sprain, and plaintiff claimed the physician should have taken an X ray picture of the leg as was suggested to the physician by the patient, and which all admit should have disclosed the fracture.

Physician declined the suggesting of an X ray, stating that he could tell by manipulation whether the bones were fractured or not. All agreed that an X ray was the most certain method to detect a fracture, that the next best is manipulation and moving of the injured part while the patient is etherized, and that manipulation without etherization is the least efficient method being limited on account of the pain caused the patient.

The Court says:

"That the defendant was perfectly familiar with all the methods and tests recognized by the profession to be used in such examinations, and understood their relative usefulness, is conceded. He concluded it was quite unnecessary in the plaintiff's case to have an X ray picture taken of the leg, or to etherize the patient, and he relied upon his manipulation of the injured parts and his examination for deformity or other possible indication of fracture, as affording him sufficient information upon which to base his

diagnosis. He made a mistake, however, and his diagnosis was wrong. But that fact alone is not sufficient to render him liable. Something must be shown. And the issue before the jury in this case necessarily was whether that mistake was the result of a failure of the defendant to use painstaking care and diligence and to exercise the best of his admitted learning, skill and judgment in his examination and treatment of the plaintiff's injuries. That issue the jury found in the plaintiff's favor.

This case is somewhat like the last, being failure of the physician to discover the physical facts necessary to make a diagnosis.

N. Y. 1871. Where, after a dislocated arm has been attempted to be set, there is a protuberance at the elbow joint, plainly to be seen, such protuberance being evidence to a surgeon that the bones are not in their place, it is for the jury to say whether the failure of the attending physician to discover this evidence or the omission to restore the bones to their place is evidence of want of attention or want of skill.

Carpenter vs. Blake, 60 Barb. 488.

The following is an example of the "hurry up, look em over" diagnosis of some allopath physicians which so frequently lead to disastrous results and unnecessary operations.

"There being evidence, in an action for malpractice, that an operation should not be attempted for a suspected uterine or ovarian tumor without a most thorough examination of the patient; and that in all cases of doubt, the theory of pregnancy being excluded, the uterus should be explored by means of a sound, in order to ascertain its depth; and that defendant made a mere external examination of plaintiff's wife, not lasting over ten minutes, for one of such troubles, though she was not deemed pregnant, by reason whereof the diagnosis was incorrect, and injury consequently resulted from the operation which followed—it was error to direct a verdict for defendant."

Griswold vs. Hutchinson, 47 Neb. 727, 66 N. W. 819.

The practitioner may wonder what would be done with the diseases which are very hard to diagnose either because rare or

the symptoms are hard to find. As there are many cases in the history of allopath medicine, the following three cases are inserted to illustrate the law:

Wohlert vs. Seibert, 23 Pa. Sup. Ct. 213.

The disease of plaintiff was chronic glaucoma. Testimony that it was a rare disease diagnosed only in clinical or special practice. The symptoms are frequently confused with those of other diseases and are often mistaken for cataract, iritis, keratitis and conjunctivitis. General practitioners rarely see such kind of cases. Percentage of cases small. Cure well nigh impossible.

Testimony—The crucial test of the competency of a witness offered as an expert to give testimony as such is the resolution of the question as to whether or not the jury or persons in general who are inexperienced in or unacquainted with the particular subject in inquiry would without the assistance of one who possesses a knowledge be capable of forming a correct judgment.

A general practitioner is probably not incompetent to give expert testimony on the ground that he had not had in his experience a case like the one in question. Rogers on Expert Testimony, page 102. And when he has given special study and observation though without experience, his testimony as an expert may be received and his credibility left to the jury.

Just vs. Littlefield, 151 Pac. 780; 87 Wash. 299.

Plaintiff was pregnant. Defendant diagnosed it as cystic tumors and operated. Other physicians had diagnosed as pregnancy but were not certain. Result—death of child.

The law is, of course, well settled that a physician is liable for a wrong diagnosis of a case resulting from a want of skill, or care on the part of the physician and followed by improper treatment, to the injury of the patient, but unless improper treatment follows, a wrong diagnosis gives no right of action.

30 Cyc. 1575; 22 Am. and Eng. Ency. Law—2nd Ed. 802.

Note by A. T. H. I think that there should be added to this unless damage follows:

5 Thompson on Negligence, 6717.

Richardson vs. Carbon Hill Coal Company, 10 Wash. 648; 39 Pac. 95.

The principal question here is whether a physician as a matter of law, is liable for a wrong diagnosis and ensuing treatment based thereon, even where there may be an honest difference of opinion among members of the medical profession as to the diagnosis when the diagnostician proceeds with due care, skill and diligence in treating the patient.

Hammick vs. Shipp, 1910; 52 So. 932; 169 Ala. 171.

Plaintiff's son was thrown by a mule. Some days afterwards the condition developed which made it necessary to procure medical attention. Defendant (physician) treated for acute articular rheumatism. Other physicians of good reputation concurred in his diagnosis and treatment. There was testimony, however, which went to show that the boy's trouble was penostitis or osteomyelitis.

Held—There is no rule of responsibility which requires the physician to be infallible in the diagnosis or treatment of diseases.

Whitesell vs. Hill, 101 Ia. 629; 70 N. W. 750; 37 L. R. A. 830.

The fact, therefore, if it was a fact, that the disease was something other than rheumatism was evidential merely not inclusive.

Physicians, surgeons and dentists, by holding themselves out to the world as such impliedly contract that they possess the reasonable and ordinary qualification of their profession and are under a duty to exercise reasonable and ordinary care and skill and diligence but that is the extent of their liability."

Here the physicians testified it was difficult to diagnose.

There are many classes of injuries, especially broken legs, arms, fractured skulls, which, according to medical science can be ascertained by anyone in the exercise of ordinary care. Thus, when there is reasonable opportunity the physician must diagnose

the broken arm when it could have been ascertained by the exercise of ordinary care.

The rule is laid down as follows:

A physician is answerable for failure to discover a serious dislocation of a patient's shoulder and a fracture of an arm, when there was reasonable opportunity for an examination, and the dislocation and fracture could have been ascertained and exercised by the exercise of ordinary care.

Manser vs. Collins, 76 P. 851; 69 Kan. 290.

Frequently on diagnosis questions of fact arise which have to be settled by the jury. For instance, the patient may claim an incorrect diagnosis and the practitioner may claim that the diagnosis was correct.

The following case is a good example of that principle:

"In an action against a physician for damages resulting from the negligent treatment of a dislocation of the clavicle, whether the injury was properly diagnosed as a dislocation or was diagnosed as a fracture was, the evidence being conflicting, a question for the jury."

Tomer vs. Aiken, 101 N. W. 769; 126 Ia. 114.

The following is a case in which the court could have submitted to the jury either the proposition of negligent diagnosis or negligent treatment. It would seem that the negligent diagnosis of a sprain instead of the broken knee cap was the one which should have been submitted to the jury instead of the question of proper treatment, because having diagnosed incorrectly the incorrect treatment follows.

In an action to recover damages from a physician for negligence in the treatment of plaintiff, evidence was given on plaintiff's behalf tending to show that plaintiff's knee cap was broken; that defendant failed to discover the nature of the injury, and treated him for a rupture of the ligaments; that he failed to use appliances and precautions in the treatment of the injury which, according to the testimony of other physicians, were the usual and necessary means and methods of treating such injuries; and that

he allowed the plaintiff to use his leg at times and in ways which, according to the testimony of other physicians, would be likely to prevent a recovery. Held that the case should have been submitted to the jury to determine whether the defendant used such degree of learning and skill as was ordinarily possessed by physicians and surgeons in the locality where he practiced, and as is regarded by those conversant with the employment as necessary to qualify one to engage in it." Judgment (1895) 32 N. Y. S. 1149, 84 Hun. 607, Reversed.

Dike vs. Honsinger, 49 N. E. 760; 155 N. Y. 201; 63 Am. St. Rep. 655.

The question of negligence is for the jury to determine.

"Where gangrene sets in because a physician waits for 10 days before amputating a crushed foot, the question whether such delay constituted negligence is for the jury, though it is claimed by the physician that he waited in order to see whether the foot could be saved."

DuBois vs. Decker, 130 N. Y. 325; 29 N. E. 313; 14 L. R. A. 429; 27 Am. St. Rep. 529; affirming 1889, 52 Hun. 610, 4 N. Y. Supp. 768.

Where experts differ the question is for jury.

Where the evidence is conflicting as to the facts on which opinions of expert witnesses are based, and where the opinions of such witnesses, on a given state of facts in the case materially differ, it is for the jury to determine, and their finding is conclusive.

Bennison vs. Walbank, 38 Minn. 313; 37 N. W. 447.
Barbour vs. Martin, 62 Me. 536.

In determining the relative value of the evidence of medical experts in an action for surgical malpractice, the jury are to consider their professional knowledge and experience, freedom from bias, and the reasons they are able to give for their conclusions.

Bennison vs. Walbank, 38 Minn. 313; 37 N. W. 447.

Barbour vs. Martin, 62 Maine, 536.

Wis. 1886. In an action against a physician for malpractice in the treatment of a woman afflicted with uterine trouble, evidence proved that she had no ulcers for which he had treated her womb with caustic; that advanced medical science discards the use of caustic in cases of uterine ulceration as dangerous; that, if proper to the case the caustic treatment was applied improperly by defendant; that such treatment caused a closure of the cervical canal, which had greatly injured plaintiff's health; and the plaintiff was not guilty of any negligence or want of reasonable care to observe the proper directions of defendant which contributed proximately to the injury in which she complains,—considered by the jury, under the correct instruction of the judge that "defendant was bound to bring to plaintiff's aid and relief such skill as is ordinarily possessed and used by physicians and surgeons in the vicinity or locality in which he resides, having regard to the advanced state of the profession at the time of the treatment," is sufficient to sustain a verdict for plaintiff.

Gates vs. Fleisher, 67 Wis. 504, 30 N. W. 674.

Minn. 1864. The question of negligence is one of fact, or of mixed law and fact, to be left to the jury, and where they find for plaintiff, it must be regarded as settling the case in his favor.

Chamberlain vs. Porter, 9 Minn. 260. (Gil. 244.)

Further than this, if the physician expresses an opinion that the disease could be cured and represents it as true of his own knowledge, and then if the physician has no knowledge of the truth of such statement, then also the physician would be liable on the ground of deception.

The following opinion illustrates that point clearly:

REPRESENTATION

Logan vs. Field, 1898, 75 Mo. App. 594.

The defendant had nasal catarrh for ten years. Plaintiff, a

physician, treated him and brought suit to collect his bill. Physician expressed opinion of curing.

Cites:

Heden vs. Institute, 62 Minn. 149.

"That a doctor with his skill and ability should be able to approximate to the truth when giving his opinion as to what can be done with injuries of one year standing, and he should always be able to speak with certainty before he undertakes to assert positively that a cure can be effected. If he can not speak with certainty let him express a doubt. If he speaks without any knowledge of the truth or falsity of a statement that he can cure and does not believe the statement true, or if he has no knowledge of the truth or falsity by such statement but represents it as true of his own knowledge, it is to be inferred that he intended to deceive.

DIAGNOSIS:

If the plaintiff, by the exercise of that degree of care and skill which the law exacts of a physician might and ought to have seasonably discovered that the defendant's ailment was incurable, or that it was a case that would not yield to the usual treatment and yet failed to do so, or if he made such discovery and failed to so advise the defendant, he was guilty of negligence.

Moratzky vs. Werth, 62 N. W. 480 (Minn.).

Lewis vs. Swennell, 82 Me. 497.

Harriett vs. Plumpton, 166 Mass. 586.

Note by A. T. H. even if this was negligence, injury would have to be proved which in this case was the running up of the physician's bill.

The moral of this is "Be honest with your patient. Don't take a case which you feel may not improve unless you disclose those facts to the patient."

Negligent treatment is much different than negligent diagnosis. For instance, negligent treatment may consist of the practitioner failing to use the reasonable degree of learning and skill

in treating the patient according to approved methods or, on the other hand, the practitioner may, although he was careful in the use of the treatment, be liable because he used a wrong or improper method of treatment.

For instance, in the case of hernia where the defendant is a member of the allopathic school. If the expert practitioners agree in opinion concerning the right method of treating hernia and the practitioner would use some other method not recognized as sound, then his conduct would be regarded in the nature of an experiment. In other words, under this situation the use of an unapproved method would constitute negligence.

On the other hand, if the method is approved or is one that is regarded as proper under the above circumstances there would be no negligence, or if there were two methods considered proper and he took his choice or the one deemed most suitable, there would be no liability.

The principle in cases of this kind are laid down in the decision of:

McLarin vs. Grensfelder, 126 S. W. 817; 147 Mo. App. 478.

If expert practitioners of defendant's school agreed in opinion about the right method of treating hernia and defendant adopted a method not recognized as sound, then, according to the courts which have passed upon the question, his conduct should be regarded as an experiment which renders him liable if it injured the plaintiff in the way alleged, that is caused peritonitis.

Carpenter vs. Blake, 60 Barb. (N. Y. 488).

Patten vs. Wiggin, 51 Me. 594; 81 Am. Dec. 593.

Jackson vs. Bumham, 20 Colo. 532; 39 Pac. 577.

Burnham vs. Jackson, 1 Colo. App. 237; 28 Pac. 250.

Pike vs. Honsinger, 155 N. Y. 201; 49 N. E. 760.

Allen vs. Voje, 114 Wis. 1; 89 N. W. 924.

Whitsell vs. Hill, 101 Ia. 619; 70 N. W. 750; 37 L. R. A. 830.

But if defendant's system of treatment was regarded as

proper, he cannot be convicted of negligence if he made use of the one he deemed most suitable for plaintiff's case.

Wells vs. Medical Association, 9 N. Y. St. Rep. 452.

The mere fact that the practitioner used the wrong method of treatment is not particularly such negligence as will render the practitioner liable, but if there are several methods which the authorities recognize, or if there is a difference of opinion among practical and skillful practitioners as to which method to use, the practitioner would not be to blame if he were to guess and to guess wrong, provided he uses his best judgment in exercising such choice.

Just the same as in diagnosing, the practitioner must possess the requisite qualifications, (that is, knowledge of the different methods) so that he would have something to guess on.

An honest mistake or error in guessing would be no defence if he did not possess the requisite qualification to guess at least intelligently.

This matter is discussed in the following case:

VanHooser vs. Berzhoff, 90 Mo. 488; 3 S. W. 72.

"Where there is a difference of opinion among practical and skillful surgeons as to the practice to be pursued in a certain class of cases, a surgeon may exercise his own best judgment and employ such treatment as experience has shown him to be best and a mere error of judgment as to that would not under the law make him liable in damages for an injury resulting to his patient."

A mistake in judgment as to what method of treatment does not always excuse the practitioner because first the practitioner must make the necessary examination upon which he is to make his judgment, and failure to make the examination would be negligence itself and the physicians "honest mistake" occurring after the negligence could have no effect on the liability of the surgeon.

This extract disposes of that point:

"The rule relieving a physician from liability for an error of judgment in his treatment does not apply where he fails to make the necessary examination before adopting a course of treatment."

Dailey vs. Shaffer, 146 N. W. 192; 178 Mich. 574.

There is another and peculiar way in which a practitioner might be held liable in malpractice. This deals with incurable cases and opinions rendered in such cases that cures could be made.

The law was based upon a case in 1898 when a patient had nasal catarrh which at that time was considered incurable by the allopathic physicians.

The allopath physician expressed many times the opinion that he could cure the disease and kept the patient coming to him for a long space of time. In such a case the physician when he gives an opinion that such a case could be cured should be able to speak with certainty before he undertakes to assert positively that a cure could be effected. If he cannot speak with certainty, let him express a doubt.

If the physician ought to have seasonably discovered that the patient's ailment was incurable and failed to do so, or if he did make the discovery and failed to inform the patient, the physician was guilty of negligence.

On the other hand, if the physician spoke without knowledge that he could cure and did not believe the statement that he could cure to be true, the physician would be guilty of deception and liable.

Assuming that the physician has the requisite knowledge and skill of the ordinary physician or surgeon, then in an operation where there are many risks to be apprehended and guarded against the reasonable care will be greater than in a minor operation.

This extension of the rule as to increasing what "reasonable care" is has not been passed on universally but the following citation is from a Minnesota case:

"The reasonable care required of a surgeon in performing an operation must be proportionate to the risks to be apprehended and guarded against."

Walker vs. Holbrook, 153 N. W. 305; 130 Minn. 106.

There is still another method by which the practitioner may be liable to his patients, and that is on the question of substitution. Many practitioners like to send some one else but patients prefer certain practitioners. If you are a practitioner in this preferred class and do not wish to attend the case yourself then be careful that you select a practitioner who possesses and will use the requisite degree of knowledge, skill and care, because if you fail to select such a practitioner and select a poorer one, then you are liable for all damages resulting from your failure to pick a good substitute.

I think the same liability may attach in picking substitutes to take care of your practice in vacation time and it certainly applies to assistants. This may be almost called, "Being negligent by proxy."

Where a physician specially employed to attend upon a patient sends a substitute, he must select a physician possessing that degree of knowledge, skill and care which physicians ordinarily possess, and, for failure, he is liable for all damages proximately resulting therefrom.

Lee vs. Moore, 162 S. W. 437.

Intoxication probably in itself is not negligence but it is very good evidence of negligent treatment or diagnosis and is one of the most deadly things which can come into a case because it not only forms the base for proof of negligence but prejudices the jury against the practitioner.

Vol. 39, Am. Digest Century Ed., P. 974. Ind. 1894.

"In an action against a surgeon for alleged malpractice, defendant's condition as to being intoxicated at the time he treated plaintiff, may be shown."

Merrill vs. Pepperdine, 9 Ind. App. 416; 36 N. E. 921.

Negligence will not be presumed because there have been bad results or the person died but the burden of proof is on the patient to prove that the practitioner was negligent.

Res Ipsa Loquitur.

London vs. Scott, 194 pac. 488.

Deceased given anesthetic while intoxicated and he died.

The gravamen of this case is negligence and negligence cannot be inferred from the fact alone that the patient died.

Haire vs. Recse, 7 Phila. 138.

Bonnett vs. Foote, 47 Colo. 282; 108 Pac. 252; 28 L. R. A. (N. S.) 136.

The maximum *Res ipsa Loquitur* has no application to a case of this character.

Ewing vs. Goode, (e. e.) 78 Fed. 442.

Negligence is not to be presumed. It must be proved.

Renio vs. Montana M. L. Co., 38 Mont. 291; 99 Pac. 853. and plaintiffs were required to assume the burden of proving the negligence charged and that London's death resulted proximately from such negligence. 3 Wharton & Stiles Jurisprudence, 1500.

From the very nature of the case each of these ultimate facts required for its proof the testimony of one qualified to give an expert opinion and in the absence of such testimony the case failed. Citing:

Pettigrew vs. Lewis, 46 Kan. 78; 26 Pac. 452.

From the foregoing chapter the reader will remember that upon employment the duty rested on the practitioner to determine when his attention could be safely discontinued. In other words, to violate his duty would be negligence on the part of the practitioner.

The following is a good example of that kind. It is the case of *Kay vs. Thompson*, Am. Law Reg. Vol. X (N. S.) 594. Jury rendered verdict for \$25,000.

"This was an action against the defendant for negligence and unskillfulness as a surgeon in his attendance on the plaintiff, whereby it was alleged the plaintiff had suffered great and unnecessary pain and had lost his hands and feet and was prevented from continuing a profitable employment in which he was engaged as superintendent of a copper mine.

At the first trial of the cause it appeared that the plaintiff was employed as superintendent and manager of a copper mine, at a place called Jetite, at a salary of £350 sterling per year, to be increased to £450. That in going to his residence from the village of Maguadavic on the night of the 23rd of December, 1865, he lost his way in the snow and was very severely frost-bitten in his hands and feet. That the defendant, who lived about nine miles distant, was sent for the next day and attended the plaintiff, dressing his hands and feet and giving directions for his treatment; that the plaintiff suffered great pain from the injuries, and frequently sent for the defendant during the next twelve days; that the defendant sent him medicine, etc., from time to time but did not visit him again until the 6th of January, when he gave some further directions as to his treatment. Between that time and the 18th day of January, the plaintiff sent for the defendant several times.

On the 18th the defendant again visited the plaintiff and found his hands and feet in a state of gangrene; the fingers were quite dead and only connected with the hands by the ligaments and tendons and the metacarpal bones were protruding nearly one-half an inch. On this occasion the defendant cut off the plaintiff's fingers and toes by merely severing the tendons. The plaintiff's sufferings continued after this and he sent for the defendant two or three times but as he did not go to him the plaintiff on the 28th day of January employed another surgeon who amputated his hands at the wrist and a part of his feet. The defendant's contention at the trial was that the plaintiff's hands and feet were so completely frozen that all vitality was destroyed and no skill could have saved them, and he knew this when he first saw the plaintiff; that his frequent attendance could have been of no service as he could have done no more than he did by poultices and giving directions for plaintiff's treatment, etc. A number of medical witnesses were examined on both sides as to whether the freezing of the plaintiff's hands was superficial or entire and if the latter, whether with proper treatment his hands and feet

could have been saved. Also whether more frequent visits to the plaintiff were necessary and whether the amputation should have been employed at an earlier period.

The jury's verdict was \$25,000.

This rule is still further extended to the end that a physician cannot quit and run, and if for instance the practitioner should make an unsuccessful operation and then quit he would be guilty of negligence.

This is illustrated by the following:

(17 Am. Dig. 1789.)

"Where a physician after an unsuccessful operation immediately quit his patient, held, that he was liable for negligence."

Burnett vs. Layman, 181 S. W. 157; 133 Tenn. 323.

"A physician who leaves a patient at a critical stage of his disease, without reason or sufficient notice to enable him to procure another medical attendant, is guilty of a culpable breach of duty; and hence it cannot be said in an action against him for such alleged misconduct, that a conversation between the patient and a third person, tending to show the former's ignorance of the doctor's absence from town, is so irrelevant as to make it immaterial, whether the exclusion of part of such conversation was proper or improper." (Maine, 1873.)

The Chiropractor should remember that he is just as liable as the allopathic physician when he fails to use the proper method.

The use of an improper method in adjustment is negligence. Whatever methods may be used to attempt to move the subluxated vertebrae back to alignment would be within the scope of Chiropractic and the Chiropractor would only be responsible according to the standard of the ordinary Chiropractor. However, the methods used to move the vertebrae to a normal alignment are divided into proper and improper methods.

What is an improper method or a proper method would depend upon the testimony of Chiropractors. First of all, any method in order to be considered a proper method, must be recognized by authorities in the Chiropractic profession as a proper

method. Second, the method must have passed the stage of experimentation.

In the event of a dispute as to what methods are recognized by the authorities, that question might become one for the jury. Whoever testified that this or that method was proper would be forced to give his reasons and explain the movement both in theory and practice.

All methods which are not proper would, of course, be improper methods. In fact, the way that methods are proven to be improper is to prove that they are not proper.

However, even proper methods may be subdivided. Some recognized moves or methods may be safer than other moves or methods and accomplish the same purpose. If so, it is the duty of the Chiropractor to use the safest move or the safest method. It is not enough for the Chiropractor to say he didn't know the safe move. It was his duty to his patient to know the safe move and it was his further duty to use that safe move in preference to any other move.

If the Chiropractor violate his duty it is negligence. If there are two moves or methods of adjusting the vertebrae, and one is safer than the other and the Chiropractor should use the move the least safe of the two and any injury should result the Chiropractor would have to pay for the resultant damage.

The writer in regard to these moves will only say that certain cervical moves have come under his attention which to his mind are unsafe moves, and they certainly would be unsafe in the hands of the clumsy, the awkward, the untrained and especially that class of practitioners who call themselves Chiropractors and don't know the first principles of adjusting.

Also take the method in which some so-called Chiropractors use a mallet. The testimony in such a case would be that such is not a proper method of adjusting or moving the vertebrae, and there would probably be no question of a verdict against such a practitioner if injury resulted or if the patient failed to improve

when he would have improved under a competent Chiropractor giving proper adjustments.

Take the so-called stretching machine. If a Chiropractor used that method, the question would be immediately raised, is the "stretching machine" a proper method to move subluxated vertebrae toward the normal alignment?

From what little the writer knows of the profession he is satisfied that Chiropractors without number would say that such a method would not move the particular subluxated vertebra back towards the normal alignment, and if the jury believed them and the patient was either injured or failed to improve as he would have done under proper adjustments the practitioner might be liable.

At this point the proposition becomes complicated, for the Chiropractor may be liable for damages either because he used an improper or an unsafe method or because he used a proper method in a negligent manner.

Observe this, Mr. Chiropractor, that if you use an improper method it matters not whether you were careful or negligent in its use, you are liable for the resultant damages. But if you stick to proper methods then before you could be held liable they would have to prove that you were negligent in the application of that proper method.

CHAPTER IX.

NOTE ON CONTRIBUTORY NEGLIGENCE

This note is confined to the substantive question of law and does not cover the questions of practice whether it is incumbent upon the plaintiff in the first instance to allege or prove freedom from contributory negligence.

It is clear that the fact that an action sounding in tort by a patient against a physician or surgeon for malpractice is founded on contract will not preclude the defendant from availing himself of the defense of contributory negligence on the part of the patient.

Lower vs. Franks, 115 Ind. 334; 17 N. E. 630.

While it is practically conceded by all the cases that it is competent for a physician or surgeon, in an action for malpractice, to prove negligence of the patient, or of another whose negligence is chargeable to him, directly and proximately contributing to the injury, there is some confusion among the cases as to whether the effect of such negligence is to bar a recovery altogether or merely to mitigate or reduce the damages. This confusion is due largely to the inherent differences in facts and conditions in different cases in which the question may arise. There are three different aspects in which the question of the effect of negligence of the patient himself, or of a third person whose negligence is chargeable to him, may arise:

(1) It may appear that there was no breach of duty on the part of the physician or surgeon, and that the injury was due entirely to the patient's own negligence or failure to follow instructions, or to such negligence or failure on the part of one whose negligence is chargeable to him. In such a case, of course, it is clear that there can be no recovery at all.

(2) It may appear that, while there was a breach of duty on the part of the physician or surgeon, yet that no substantial injury would have resulted therefrom but for the patient's own negligence, or that of a third person whose negligence is chargeable to him. This is analogous to the situation presented in the ordinary action for personal injuries where but for the plaintiff's own antecedent negligence there would have been no accident, and therefore no injury, at all. Upon this hypothesis, the patient's negligence is one of the causes which proximately contributes to the occurrence of the injury, and does not affect merely its extent. In such a case, also, it seems clear that the negligence of the patient himself, or of a third person whose negligence is chargeable to him, though slight as compared with that of the physician or surgeon, will preclude a recovery altogether, and not merely mitigate the damages. There is a possible exception to this proposition in those jurisdictions, if any, in which there are any remnants of the doctrine of comparative negligence.

(3) It may appear—and this is probably generally the case—that there was a breach of duty on the part of the physician or surgeon which, even in the absence of negligence on the part of the patient, or of a third person whose negligence is chargeable to him, would have caused some injury; but that the injury was aggravated by that of the patient, or of such third person. Here the analogy is to those cases where an accident resulting in an injury was caused solely by the negligence of the defendant, but the injury was subsequently aggravated by the plaintiff's own negligence; and it would seem—at least if it is possible to separate the consequences of the negligence of the physician or surgeon from that of the patient—that the latter's negligence should not bar a recovery altogether, but merely mitigate the damages so that the physician or surgeon would be held only for such injuries as resulted from his own breach of duty, and relieved from liability for such of the injuries as resulted from the negligence chargeable to the patient himself.

It is obvious that the statement of the court in *McCandless vs.*

McWha, 22 Pa. 261, that if it should appear on a retrial that the surgeon performed his whole duty to his patient, and that any defects in the limb were due to the patient's fault, there ought to be no recovery, goes no further than the first of the foregoing propositions.

This is also true of the statement in *Dashiell vs. Griffith*, 84 Md. 363, 35 Atl. 1094, that, if an office patient receives careful and skillful treatment, and then fails to return to the office for further treatment, and, in consequence thereof, suffers injury, he is not entitled to maintain an action against the physician, because it is his own fault and misfeasance.

The decision in *Reber vs. Herring*, 115 Pa. 599, Atl. 830, to the effect that negligence on the part of the plaintiff which contributes to the injury will bar a recovery, is probably referable to either the first, or the second, of the classes above stated.

Some of the court, in stating the general rule that contributory negligence on the part of the plaintiff will bar a recovery, apparently ignore the distinctions already referred to, and state the rule in terms broad enough to cover the third class of cases as well as the first and second.

Thus, the court, in *Geiselman vs. Scott*, 25 Ohio St. 86, declared that it is a well-settled principle of law that a party seeking to recover for an injury must not have contributed to it in any degree, either by his negligence, or the disregard of a duty imposed upon him by a party who, by his negligence or want of skill, may also in some degree have contributed to the injury; and approved an instruction that, if the patient negligently failed to observe the physician's directions, or purposely disobeyed the same, and such neglect or disobedience proximately contributed to the injury of which he complains, he cannot recover although he may prove that the defendant's negligence and want of skill also contributed to the injury; and that it makes no difference that one of the parties contributed in a much greater degree than the other; the patient must not have contributed at all.

So, in *Baird vs. Morford*, 29 Iowa, 531, the refusal of an

instruction requiring the patient to prove that no negligence of his own tended to "increase or consummate" the injury complained of was held erroneous.

And in *Swanson v. French*, 92 Iowa, 695, 61 N. W. 407, the court apparently approved an instruction that the burden was upon the plaintiff to prove that he was not guilty of any fault or negligence which directly contributed to the injury; but in this case it was the physician, and not the patient, who was complaining of the instruction.

And in *Link vs. Sheldon*, 45 N. Y. S. R. 165, 18 N. Y. Supp. 815, the court apparently approved an instruction to the effect that if any part of the injuries complained of were caused by the defendant, and a part was also caused by the fault of the plaintiff or his parents, or of others who treated the case after the defendant had left, there can be no recovery; but in this case also the physician, and not the patient, was the appellant.

In *Scudder vs. Crossan*, 43 Ind. 343, the court, in support of its decision that the averments in the complaint that, by reason of the unskilfulness, negligence and want of care on the part of the defendants in treating the broken arm, it became inflamed and mortified, and had to be amputated, were sufficient to show that the plaintiff and his injured son were without fault and that their negligence did not contribute to the result, remarked that the allegations would not be sustained if it appeared that the negligence of the plaintiff or his son, whose arm was broken, contributed to it.

In *Becker vs. Janinski*, 27 Abb. N. C. 45, 15 N. Y. Supp. 675 (a nisi prius case), the jury were instructed that, if the injury of which the plaintiff complains was the effect of the plaintiff's own negligence alone, or was the effect of the defendant's negligence or want of skill in combination and co-operation with her own negligence, she could not recover; and that her contributory negligence would defeat the action.

In *Chamberlain vs. Porter*, 9 Minn. 260, Gil. 244, the court said, in effect, that the question of contributory negligence was

a substantive issue, and had no relation to the question of damages.

In *Young vs. Mason*, 8 Ind. App. 264, 35 N. E. 521, the court said that, where both the surgeon and the patient are free from negligence, or where the surgeon and patient are both guilty of negligence, or where the surgeon is free from fault and the patient is guilty of negligence, no recovery can be had; and that it is only where the surgeon is guilty of negligence and the patient is without negligence on his part contributing in any degree to the injuries that the patient can recover damages of the surgeon.

Notwithstanding the generality of the language employed in these cases, and although it cannot be positively affirmed that it was employed with reference to the first or second of the classes above referred to, to the exclusion of the third, they can hardly be regarded as authority for holding that the negligence of the patient would be a complete bar to recovery in a case of the third class—that is, where the defendant's breach of duty would have caused some injury even if the patient's negligence had not supervened.

The distinction between the second and third classes is clearly brought out by the opinion in *Wilmot vs. Howard*, 39 Vt. 447, 94 Am. Dec. 338, holding that, if the improper manner in which the plaintiff's arm was dressed after an accident brought it in such condition that he must inevitably have a defective arm, the surgeon would be liable even though it should be found that mismanagement or neglect on the part of those having charge of the plaintiff may have aggravated the case and rendered the ultimate condition of the arm worse than it otherwise would have been; that the supervening mismanagement or negligence would bear only on the measure and amount of damages, not on the right of action. The court distinguishes the case from those where the contributory negligence on the part of the plaintiff enters into the creation of a cause of action, and not merely supervenes upon it by way of aggravating the damaging results.

The same distinction is observed in *Carpenter vs. Blake*, 75 N. Y. 12, holding that a request to charge was properly refused

because it was to the effect that negligence on the part of the patient after the surgeon had ceased to attend him would defeat a recovery; the court remarking that the cause of action, having previously accrued, could not be discharged by the subsequent negligence of the plaintiff, or of another surgeon whom she afterwards employed, that the most which could be claimed on account of any subsequent negligence would be that it would mitigate the amount of the plaintiff's damages.

To the same effect are *DuBois vs. Decker*, 130 N. Y. 325, 14 L. R. A. 429, 27 Am. St. Rep. 529, 29 N. E. 313, and *McCracken vs. Smathers*, 122 N. C. 799, 29 S. E. 354, both of which observe the distinction.

The distinction is also clearly suggested in *Beadle vs. Paine*, 46 Or. 424, 80 Pac. 903, where the court said it is a good defense in an action for malpractice that the patient was negligent at the time, which conducted or contributed to produce the injury complained of; but it will not suffice to defeat the action that the injured party was subsequently negligent and thereby conducted to the aggravation of the injury primarily sustained at the hands of the physician or surgeon; and such conduct on the part of the patient is pertinent to be shown in mitigation of damages only where enhanced thereby, but not to relieve against the primary liability.

To the same effect is *Sanderson vs. Holland*, 39 Mo. App. 233, which also clearly states the distinction.

In *Carpenter vs. McDavitt*, 53 Mo. App. 393, the charge was held erroneous because it omitted an instruction that, if the jury found for plaintiff, they should assess only such damages as he had sustained on account of the treatment of his injury, and should not allow any damages for any aggravation of the injury, or new injury, caused by his own imprudent use of his leg.

It seems, however, that even when the physician's or surgeon's breach of duty would have caused some injury even if the patient's own negligence had not supervened, such negligence may nevertheless bar recovery altogether if it is impossible to

distinguish between the injuries due to the former's negligence and those due to the latter's negligence.

Thus the court, in *Hibbard vs. Thompson*, 109 Mass. 286, approved and commended an instruction that, "If it be impossible to separate the injury occasioned by the neglect of the plaintiff from that occasioned by the neglect of the defendant, the plaintiff cannot recover. . . . If, however, they can be separated, for such injury as the plaintiff may show thus proceeded solely from the want of ordinary skill or ordinary care of the defendant, he may recover."

To the same effect is *Jones vs. Angell*, 95 Ind. 376.

In *Richards vs. Willard*, 176 Pa. 181, 35 Atl. 114, an instruction was held erroneous because it undertook—what the court said was manifestly impossible—to set up a dividing line at the time the plaintiff left the hospital where he had been treated by the defendant, and to attempt to separate those consequences of alleged negligent treatment which occurred prior to plaintiff's leaving the hospital from the ulterior consequences resulting from the plaintiff's contributory negligence after he left. The court said that it was impossible to know what would have been the result of the defendant's treatment if the plaintiff had remained at the hospital. This decision was apparently made with reference to the facts before the court, and is not to be regarded as authority for the position that it is impractical in any case to undertake to distinguish between the consequences due to the negligence of the physician and of the patient respectively.

It is obvious, of course, that the question as to what the patient must do or omit to do in order to keep himself free from the charge of negligence, and the question whether his negligence, if any, proximately contributed to the injury, and the extent to which it contributed, depend very largely upon the circumstances of the particular case; and that any generalizations on the subject are of but little value. It may be said generally, however, in this connection, that it is the duty of the patient to submit to the treatment prescribed by his physician, and follow the necessary

or reasonable direction given by him. *Jones vs. Angell*, supra; *Lawson vs. Conaway*, 37 Va. 159, 18 L. R. A. 627, 38 Am. St. Rep. 17, 16 S. E. 564; *Haire vs. Reese*, 7 Phila. 138.

So, it is the duty of the patient to follow reasonable advice of his surgeon; and, if the latter requests additional assistance, and the patient refuses or neglects to procure it, the surgeon cannot be held liable for a permanent injury resulting therefrom, though he may have made a mistake in the treatment.

Hearing vs. Spicer, 92 Ill. App. 499.

So, a surgeon is not liable if prevented from reducing a dislocation by the refusal of a patient to submit to an operation.

Littlejohn vs. Arbogast, 95 Ill. App. 605.

But the refusal of a patient to have her limb rebroken and reset does not relieve a surgeon from liability where, by reason of want of ordinary care and skill on his part, the limb was permitted or caused to be crooked—especially where there was evidence tending to show that such an operation would be attended with great pain, and that, at the patient's age and in her physical condition, there was great danger that it would prove fatal to her.

Morris vs. Despain, 104 Ill. App. 452.

It was held in *Gramm vs. Boener*, 56 Ind. 497, that if a surgeon, when requested by a patient of mature years and sound mind to rebreak and reset his arm, advised him that an operation is unnecessary and improper, but, in compliance with the patient's insistence, performs the operation, he cannot be held responsible to the patient for the damages, on the ground that the operation was improper and injurious.

There is, however, no duty on the part of a patient to test the propriety of the physician's treatment, the nonperformance of which will constitute a defense to an action against the physician for maltreatment.

Schoonover vs. Holden (Ia.) 87 N. W. 737.

To preclude a recovery, the patient's own negligence or improper conduct must have contributed substantially to produce the injury.

West vs. Martin, 31 Mo. 375, 80 Am. Dec. 107.

An instruction to the effect that plaintiff's negligence must have directly contributed to his injury in order to defeat a recovery is not erroneous because the word "directly" is used instead of "proximately."

Davis vs. Spicer, 27 Mo. App. 279.

There can be no recovery by a child for malpractice if the negligence of his parents contributed to his injury.

Sanderson vs. Holland, 39 Mo. App. 233;

Potter vs. Warner, 91 Pa. 362; 36 Am. Rep. 668.

But a physician who, by a slip of the pen, improperly wrote a prescription, cannot escape liability for death resulting from the patient taking the prescription, by reason of the negligence of the druggist who filled the same in failing to discover the error.

Murdock vs. Walker, 43 Ill. App. 590.

DAMAGES

CONTRIBUTORY NEGLIGENCE

Dubois vs. Decker, 130 N. Y. 325; 29 N. E. 313.

When a liability for negligence or malpractice is established, proof that the patient after the liability was incurred, disobeyed the orders of the physician and so aggravated the injury, does not discharge the liability but simply goes in mitigation of damages.

CHAPTER X.

SPEAD vs. TOMLINSON

There are several leading cases which clearly represent certain question of law and while these cases do not all take the same view, they are such well reasoned cases that they are reproduced here.

The first case is that of *Spead vs. Tomlinson*, 59 Atl. Rep. 376, which was an action brought against a Christian Scientist for negligently treating chronic appendicitis.

Case to recover for damages alleged to have been suffered by the plaintiff at the hands of the defendant, who is a Christian Science healer. The declaration contains counts in contract, negligence and deceit. Two trials were had in the superior court.

At the first trial a verdict was ordered for the defendant upon the count in contract, subject to the plaintiff's exception. The case was submitted to the jury upon the other counts, and a disagreement resulted. The court refused to transfer the question raised by the exception to the direction of a verdict, and no bill of exceptions was filed. At the second trial the plaintiff excepted in a denial of her request for permission to introduce evidence upon the count in contract and to the direction of a verdict for the defendant upon the other counts.

In April, 1898, the plaintiff, who was then about 55 years old, suffered from an attack of appendicitis, employed a medical practitioner for several months, and learned in a general way the course pursued by physicians in the treatment of that disease. During the summer of 1899 she became interested in the doctrines of Christian Science, and attended meetings where the defendant told of wonderful cures he had performed. November 13, 1899,

the plaintiff noticed symptoms similar to those which had ushered in the previous attack of appendicitis, visited the defendant at his home, informed him of the nature of her trouble and her dread of a surgical operation, and employed him to treat her. The defendant told her that a surgical operation was not necessary, that she was not to take any medicine, and that he could and would cure her if she continued his treatment. He directed her to read "Science and Health," to continue her usual diet of solids, and to take her accustomed exercise. He also read to her extracts from "Science and Health," and administered treatment by sitting in front of her in an attitude of prayer. The plaintiff employed the defendant for several days, and during this time her illness increased. She finally placed herself in the hands of physicians, submitted to a surgical operation, and was cured. There was evidence tending to show that the defendant's treatment was injurious to the plaintiff, and that, if it had been persisted in, a cure would have been impossible. The plaintiff knew that the defendant made no claim to any knowledge of medicine and surgery, that he relied solely on the power of God to heal disease, and that his advice and treatment were contrary to what she would have received from a physician. She testified that she employed him because she believed he could cure her, and that her belief was based upon his representations as the efficacy of his treatment in other cases. She further testified that she did not doubt the sincerity of Christian Scientists, nor the sincerity of her own belief in their doctrines at the time she employed the defendant.

1. Whether the verdict was properly directed for the defendant at the first trial upon the count in contract is not considered, as the question is not before us. At the time of the second trial the counts in negligence and deceit presented the only issues of fact that remained undisposed of; and, while judgment had not been ordered upon the verdict directed upon the count in contract, it seems, as the case then stood, that there was no occasion for a trial of any issue of fact upon that count, and

the record presents no error in the ruling of the court as to this matter.

2. In arguing the questions raised by the plaintiff's exception to the verdict directed upon the count in negligence, counsel discussed at some length the standard of care by which the defendant is to be judged. It was contended in behalf of the defendant that it was the care, skill and knowledge of the ordinary Christian Scientist who undertakes to treat diseases according to the methods practiced by such healers, while the plaintiff's counsel claimed that it was the care, skill and knowledge of the ordinary physician. The latter position is clearly untenable. The principle involved is not new. It has long been recognized as the law of this state that 'a person who offers his services to the community generally, or to any individual, for employment in any professional capacity as a person of skill, contracts with his employer that he possesses that reasonable degree of learning, skill and experience which is ordinarily possessed by the professors of the same art or science, and which is ordinarily regarded by the community, and by those conversant with that employment, as necessary and sufficient to qualify him to engage in such business.' *Leighton vs. Sargent*, 27 N. H. 460, 469, 59 Am. Dec. 388. The same principle governs the conduct of persons, other than professional men, who undertake duties requiring special qualifications. One employed to do work requiring skill upon a chattel is said to engage to use "that skill and diligence which prudent local workmen of the same class are wont to bestow upon similar undertakings." 1 Schoul, Bail, Sec. 104. If, however, the employe is known not to possess the requisite skill, or is not called upon to exercise the particular art or employment to which he belongs, and he makes no pretension to skill in it, the law does not require that he should exercise the skill he is known not to possess, or the particular art or employment to which he does not belong and in which he does not pretend to be skilled. In such a case if loss ensues because of his lack of the requisite knowledge and skill in the particular employment, it must be borne by the employer;

for the employe, under such circumstances, is responsible only for a failure to reasonably exercise the skill which he possesses, or the judgment, which he can employ. As is said in Story's Bailments, Sec. 435: "If a person will knowingly employ a common matmaker to weave or embroider a fine carpet, he must impute the bad workmanship to his own folly. So, if a man who has a disorder of his eye should employ a farrier to cure the disease, and he should lose his sight by using the remedy prescribed in such cases for horses, he would certainly have no legal ground of complaint." And in cases involving the liability of medical practitioners courts have held that, "if there are distinct and differing schools of practice, all allopathic, or old school, homeopathic, Thompsonian, hydropathic, or water cure, and a physician of one of those schools is called in, his treatment is to be tested by the general doctrines of his school, and not by those of other schools." *Patten vs. Wiggin*, 51 Me. 595, 81 Am. Dec. 593; *Carpenter vs. Blake*, 60 Barb. 488, 513, 514; *Bowman vs. Woods*, 1 G. Greene, 441, 413; and cases cited in briefs of counsel. In *Bowman vs. Woods, supra*, which was an action against a botanic physician, who had attended the plaintiff at childbirth, and had not removed the placenta for 36 hours after her accouchement, the defendant offered to prove that according to the botanic system of practice in medicine it was considered improper to remove the placenta; that it should be permitted to remain until expelled by efforts of nature. And it was held that such proof would be a defense; that "a person professing to follow one system of medical treatment cannot be expected by his employer to practice any other. While the regular physician is expected to follow the rules of the old school in the art of curing, the botanic physician must be equally expected to adhere to his adopted method. * * * The law does not require a man to accomplish more than he undertakes, nor in a manner different from what he professes." In the present case the evidence discloses that the plaintiff was suffering from an attack of appendicitis, and that the defendant, a Christian Scientist, who held himself out as competent to treat diseases, upon being

applied to for treatment by the plaintiff, undertook for a reward to treat her. He told, in substance, that her disease was curable without a surgical operation, that drugs and medicines should not be used, and that he could and would cure her if she would take the treatment. The plaintiff knew the treatment which the regular school of physicians would prescribe for appendicitis, and that the defendant was not a physician of that school, and did not practice according to its methods, but was a Christian Scientist, and practiced according to the methods recognized by such healers. Under these circumstances a jury could not find that the defendant undertook to treat the plaintiff according to the methods of the regular school of physicians, or that he held himself out as possessing the knowledge and skill of the practitioners of that school. Such a finding would be contrary to what the evidence shows the parties understood at the time of entering into the contract, and the law will not imply an undertaking which a jury could not reasonably find from the evidence. Schoul, Bail., Sec. 105. The plaintiff knew that she was not to be treated according to the methods of the regular school. Had she been an infant, non compos, or had never assented to Christian Science treatment, then the question whether the practice of Christian Science, as applied to the treatment of appendicitis, is so contrary to common sense and reason that it would be negligent for such a practitioner to undertake to treat the disease, might be open to consideration by a jury. But being a person of mature years, and having sought such treatment, she cannot now complain that the method itself was improper. What the parties mutually expected was that the defendant would treat the plaintiff according to Christian Science methods; and it necessarily follows that the defendant, in the treatment of the plaintiff, is to be judged by the standard of care, skill and knowledge of the ordinary Christian Scientist, in so far as he confined himself to those methods.

3. Was there evidence tending to show that the defendant did not possess the knowledge and use the care and skill of the ordinary Christian Scientist, in the treatment of the plaintiff?

It has been held in cases where the medical profession recognizes but one course of treatment that the adoption of any other course might be evidence of a want of ordinary knowledge, care, and skill. (*Patten vs. Wiggin*, supra; *Howard Vs. Grover*, 28 Me. 97, 48 Am. Dec. 478, 483, note; *Slater vs. Baker*, 2 Wils, 359; and cases cited in briefs of counsel); and the plaintiff's contention is that, when the defendant told her to keep about the room the same as usual, to eat anything she wanted, not to lie down, and took hold of her and made her sit up when she was lying down, he deviated from the recognized methods of the practice and was negligent. While there was testimony that no material means are employed or considered by Christian Scientists in the treatment of disease, there was no evidence that these directions interfered with Christian Science practice; and we are of the opinion that a jury could not find from this evidence that the defendant deviated from the practice of the science, and that he did not possess the knowledge and use the care and skill of the ordinary Christian Scientist.

ON REHEARING

After the filing of the foregoing opinion, upon the request of the parties they were further heard by brief and oral argument.

There was no evidence from which it could be found that the plaintiff employed the defendant to advise her as to whether or not Christian Science could be successfully employed in the treatment of appendicitis, or to do anything except to treat her by that method. Under these circumstances, if she could legally employ him to give her such treatment, the duty the law imposed on him for her benefit was that of treating her as the ordinary man who treats the disease in that way would have done; for when persons are brought together by virtue of a contract, as doctor and patient, or lawyer and client, the duty the law imposes on the doctor for the benefit of his patient, and on the lawyer for the benefit of his client, and in general on the person who undertakes to do anything for the benefit of his employer, is that of using or-

dinary care to do what he has agreed to do in the way he agreed to do it. The reason for this is obvious. If there are different legal methods of treating a disease, or of doing any other work, the employer has the right to decide which method shall be used in his case. When a person has contracted to do a piece of work in a particular way, he is legally bound to do it in that way. So the duty the law imposes on him for his employer's benefit is that of using ordinary care in doing the work by the agreed method.

The test of the defendant's negligence is whether in his treatment of the plaintiff he failed to do anything which the ordinary man who treats appendicitis by Christian Science methods would have done. Evidence, to be relevant to that issue, must tend to prove that he did something which such a man would not have done. The plaintiff's claim that the defendant's statement that he could and would cure her is such evidence cannot be sustained, for it is not a matter of common knowledge that Christian Science healers are not accustomed to encourage their patients by assuring them they can and will cure them; nor was there any evidence that such was not the fact. Neither is it enough to entitle the plaintiff to go to the jury, in the absence of other evidence tending to prove that the defendant was negligent, to show that a relation of trust existed between the parties. The fact that he was her pastor and physician at the time he gave her the treatment has no tendency to prove how he treated her. It is clear she cannot prove that he failed to do what he ought to have done without showing what he actually did.

By public policy is intended the policy of the state as evidenced by its laws. When the issue is its policy in respect any question, the only matters which can be considered are its Constitution and statutes and the provisions of the common law as evidenced by the decisions of the courts; for the common law, modified by the Constitution and statutes of the state, is the law of the state. *Vidal vs. Girard*, 2 How. 127, 197, 11 L. Ed. 205; *Hollis vs. Seminary*, 95 N. Y. 166, 171; *People vs. Hawkins*, 157 N. Y. 1, 12, 51 N. E. 257, 42 L. R. A. 490, 68 Am. St. Rep. 736;

Company vs. Nunnemaker, 142 Ind. 564, 41 N. E. 1048, 51 Am. St. Rep. 193, 196; *Richardson vs. Mellish*, 2 Bing. 229. Since nothing is opposed to public policy which is not forbidden by some provision of law, the contention that it would be contrary to sound public policy to permit the defendant to escape without paying damages must mean that there is some provision of our constitution or statutes, or of the common law, which made it illegal for the defendant to rely solely on prayer to heal the plaintiff when he knew she had chronic appendicitis, and which gives her an action to recover all the damages she sustained because of such reliance. The court are not authorized to allow an action against the defendant, even if they think he ought to have known that Christian Science must fail when applied to the treatment of chronic appendicitis, unless there is a general rule of law which gives such an action. If the plaintiff is to recover on the ground of public policy, she must establish (1) that it was illegal for the defendant to give her such treatment; (2) that the duty of not giving it was imposed on him for her benefit; and (3) that no illegal act of hers contributed to cause her injuries. It is the general rule that the plaintiff in an action sounding in negligence must show that the defendant failed to perform a duty owed him, and that his own failure to perform a duty owed the defendant did not contribute to cause his injury; or, in other words, he must show the defendant's fault and his own freedom from fault. Assuming (without deciding) that such treatment is forbidden by the provisions of Section 8, c. 278, Pub. St. 1891, which makes the killing of a human being by culpable negligence manslaughter, or by the provision of the common law, which makes it unlawful for any one to do what is liable to endanger the life or health of others (*Goodyear vs. Brown*, 155 Pa. 903, 26 Atl. 665, 20 L. R. A. 838, 35 Am. St. Rep. 903, 907), and that the duty of not doing what is forbidden by either provision was imposed on the defendant for the plaintiff's benefit, the question still remains whether the plaintiff's own wrong contributed to cause her injuries. It is elementary that, if it was illegal for the defendant

to treat the plaintiff as he did, it was equally illegal for her either to knowingly employ him to give her such treatment, or to consent to be so treated. So far as the evidence goes, her knowledge in respect to the disease from which she was suffering and the treatment prescribed for it by regular physicians in good standing, and in respect to the way the defendant proposed to treat her, was at least equal to his.

It does not follow, as a matter of law, from the fact that the plaintiff cannot recover in this action on the count in negligence, that the defendant would not have been guilty of manslaughter if the plaintiff had died from the effects of his treatment. If he had been indicted under the provisions of Section 8, c. 278, Pub. St. 1891, the state would base its right of action on his failure to perform a duty the law imposed on him for its benefit. The state has a direct interest in the lives and health of all its citizens. Every one who has to do with the lives and health of others not only owes the individuals with whom he comes in contact a legal duty, but also owes the state the duty of using ordinary care to do nothing which will endanger their lives or health. In an action by the state it would be no answer to show that if the deceased had used ordinary care to avoid being injured, he would not have died; for the defendant is not indicted for his failure to perform a duty the law imposed on him for the deceased's benefit, but for his failure to perform one imposed on him for the benefit of the state. It is no more an answer in such an action to show that, notwithstanding the defendant's fault, death would not have resulted if the deceased had used ordinary care to avoid being injured, than it would be in an action against one or two joint tort feorsors to show that, notwithstanding the defendant's negligence, the plaintiff would not have been injured if the other had done his duty. *State vs. Center*, 35 Vt. 378; *Commonwealth vs. Collberg*, 119 Mass. 350, 20 Am. Rep. 328; *Commonwealth vs. Pierce*, 138 Mass. 165, 52 Am. Rep. 264; *State vs. Hardister*, 38 Ark. 605, 42 Am. Rep. 5; *Rex vs. Walker*, 1 C. & P. 320; *Rex vs. Long*, 4 C. & P. 423. The conclusion that the plaintiff's in-

telligent and voluntary consent to follow the defendant's advice and abide the result of his prayers is an answer to her claim for damages on the count in negligence, previously announced, is reaffirmed.

The sufficiency of the defendant's statement as evidence of an unperformed contract to cure the plaintiff is not before the court. Hence, since she cannot recover on the count for negligence, the only question remaining is whether she can recover on the count in deceit for the defendant's statement that he could and would cure her. In such an action the plaintiff must allege and prove not only that the representation was false, but also that it was made with fraudulent intent. *Lord vs. Colley*, 6 N. H. 99, 102, 25 Am. Dec. 445; *Holtt vs. Holcomb*, 23 N. H. 535, 552; *Bedell vs. Stevens*, 28 N. H. 118, 124; *Mahurin vs. Harding*, 28 N. H. 128, 131, 132, 59 Am. Dec. 401; *Gage vs. Gage*, 29 N. H. 533, 543; *Hanson vs. Edgerly*, 29 N. H. 343, 357; *Page vs. Parker*, 40 N. H. 47, 69; *Pettigrew vs. Chellis*, 41 N. H. 95; 99; *Griswold vs. Sabin*, 51 N. H. 167, 170, 12 Am. Rep. 76; *Springfield vs. Drake*, 58 N. H. 19; *Messer vs. Smyth*, 59 N. H. 41; *Rowell vs. Chase*, 61 N. H. 135; *Stewart vs. Stearns*, 63 N. H. 99, 56 Am. Rep. 496; *Ashuelot Bank vs. Albee*, 63 N. H. 152, 56 Am. Rep. 501; *Syracuse Knitting Co. vs. Blanchard*, 69 N. H. 447, 43 Atl. 637; *Cross vs. Peters*, 1 Me. 376, 10 Am. Dec. 78, 95; *Nash vs. Company*, 163 Mass. 574, 40 N. E. 1039, 28 L. R. A. 753, 47 Am. St. Rep. 489; *Upton vs. Vail*, 6 Johns, 181, 5 Am. Dec. 210; *Kountze vs. Kennedy*, 147 N. Y. 124, 41 N. E. 414, 29 L. R. A. 360, 49 Am. St. Rep. 651; *Cowley vs. Smyth*, 46 N. J. Law, 380, 50 Am. Rep. 432; *Lord vs. Goddard*, 13 How. 198, 14 L. Ed. 111; *Pasley vs. Freeman*, 3 T. R. 51; *Haycraft vs. Creasy*, 2 East. 92; *Derry vs. Peck*, 14 App. Cas. 337. The intent with which an act is done is to be proved, like other facts, by the weight of competent testimony; but when the representation relates to a matter which is susceptible of personal knowledge and is made as of the maker's own knowledge, the jury may find from the fact that it is false that it was made with a fraudulent intent.

A positive statement of that kind not only includes a representation that the fact is as stated, but also the further representation that the maker knows it to be so. Whenever a person makes such a statement, the jury may find from the fact that it is untrue that it was made with a fraudulent intent. If the maker was acquainted with the facts, he knew the statement to be false when he made it. If he was unacquainted with the facts, he knew the representation that he was acquainted with them to be false. In the one case the fraud consists in stating what one knows to be untrue; in the other in representing that he has knowledge upon a subject in respect to which he is ignorant. It can be found from such evidence that the representation was made with fraudulent intent if it was made to induce another to act, for a representation which the maker knows is untrue is made with a fraudulent intent when it is made to induce another to change his position. *Syracuse Knitting Co. vs. Blanchard*, 69 N. H. 447, 449, 43 Atl. 637; *Pasley vs. Freeman*, 3 T. R. 51. When a representation relates to a matter not susceptible of personal knowledge, it cannot be considered as anything more than a strong expression of opinion, notwithstanding it is made positively and as of the maker's own knowledge. The mere fact that it is stated positively cannot make it a statement of fact. The most that any one can do as to such matters is to express his opinion. It cannot be found from the single fact that such a statement is untrue that it was made with fraudulent intent. There must also be evidence that the maker knew it was in some respect untrue, before there is anything to submit to the jury. *Page vs. Bent*, 2 Metc. 371; *Nash vs. Company*, 163 Mass. 574, 40 N. E. 1039; 28 L. R. A. 735, 47 Am. St. Rep. 489; *Marsh vs. Falker*, 40 N. Y. 562; *Kountze vs. Kennedy*, 147 N. Y. 124, 41 N. E. 414, 29 L. R. A. 360, 49 Am. St. Rep. 651; *Cowley vs. Smyth*, 46 N. J. Law. 380, 50 Am. Rep. 432; *Haycraft vs. Creasy*, 2 East. 92. It follows that a representation cannot be the foundation of an action of deceit unless it contains a statement of fact in respect to which the maker could have personal knowledge; for, unless it does, it contains nothing in rela-

tion to which he could state what he actually knew to be untrue. When a person gives his opinion, the statement that it is his opinion includes one that he believes what he has said to be the truth; in other words, that what he has stated as his opinion is his opinion. Every expression of opinion contains at least that one statement of fact; consequently a person can state what he knows to be false, for the purpose of inducing another to change his position, when he pretends to express his opinion as to any matter as well as when he pretends to state facts in relation to it. In such a case the falsity of the statement consists in stating something as his opinion which is not his opinion. If it is conceded that an action of deceit may be founded upon a mere expression of opinion (a question which it is necessary to decide in this case, and upon which no opinion is expressed), it will be necessary, when the opinion relates to a matter upon which no one can have personal knowledge, to introduce some evidence from which it can be found that the person who gave the opinion did not in fact entertain it.

The statement that it was his opinion would be the only statement of fact the opinion contained, and the only matter in respect to which he could state what he knew to be false. It cannot be found that he did not entertain such an opinion from the mere fact that the jury are convinced that it is unsound. The reason for this is obvious. It is a matter of common knowledge that men frequently change their opinions. Few can recall the views held at different periods in life in reference to any matter incapable of exact proof, without a feeling of surprise at the number of times they have changed their minds in regard to it. Neither is the seeming absurdity of a belief alone evidence from which it can be found that a person does not entertain it. We all know that honest men frequently entertain opinions which seem utterly absurd to the majority of their fellow men. Common experience teaches that men ordinarily tell the truth, even when they say they believe things which seem absurd; so the fact that a person states something which appears absurd, or even incapable of belief, is

at least as consistent with the view that it is his belief as it is with the view that he is lying. Hence the fact of its seeming absurdity, in and of itself, has no tendency to prove he does not entertain such a belief. *Deschenes vs. Railroad*, 69 N. H. 285, 46 Atl. 467; *Darling vs. Westmoreland*, 52 N. H. 401, 13 Am. Rep. 55; *State vs. Lapage*, 57 N. H. 245, 24 Am. Rep. 69; *Nutter vs. Tucker*, 67 N. H. 185, 30 Atl. 352, 68 Am. St. Rep. 647; *Lawrence vs. Tennant*, 64 N. H. 532, 540, 15 Atl. 543. We have only to consider common superstitions to be convinced of the falsity of any other view. For example, it is not unusual to hear persons unskilled in meteorology say when they see the new moon that we shall have a wet month or a dry month, according to the moon's position in relation to the earth, or that we shall have unseasonable weather during the year if the weather is unseasonable at Christmas. Notwithstanding the jury could find that such statements are absurd, no one would think the jury could infer from the single fact that they were convinced of their absurdity that such persons in making such statements were lying; but if there was evidence that the persons making these statements were educated meteorologists, or that they believed weather conditions to be due to other causes, and it appeared that these statements were made with the intent that they should be acted upon, the jury could find they were not made in good faith.

Assuming that the defendant's statement that he could and would cure the plaintiff may be the foundation of an action of deceit, her case fails, for there was no evidence that he made it with a fraudulent intent. Although a jury could find from their knowledge of human affairs, their own experience, and the evidence in the case, that the defendant's statement that he could cure the plaintiff without the aid of any material agency, when he knew she had appendicitis was untrue, it does not follow that they could infer, from the single fact that they were convinced of its untruth, that the defendant did not believe he could induce God to heal her when he made the statement. The evidence tended to prove that both parties believed there was no such thing as

physical pain, and that those sufficiently proficient in the metaphysics of Christian Science could induce God to heal all manner of diseases through the agency of prayer. In short, the healing of diseases by the prayers of the faithful was a part of their religious belief. It is a matter of common knowledge that honest men not only have in the past, but do now, entertain religious beliefs which appear to the great majority of their fellow men both unsound and incapable of belief. So, even if a relation of trust existed between the parties when the plaintiff employed the defendant to give her Christian Science treatment, a jury could not find from the single fact that they were convinced the religious views both parties professed to entertain were absurd that the defendant did not entertain them. There was no evidence that the defendant had any knowledge of physiology or medicine, or, aside from the plaintiff's statement to him of the fact (if it were a fact), that the plaintiff could have relief only through a surgical operation. If, in the absence of any evidence, such knowledge on his part could be inferred as part of the general knowledge of mankind upon the subject, such inference cannot be made in this case in the face of the direct and uncontradicted evidence of his belief as to the most effectual remedy for the relief of physical pain. Neither was there any evidence that he did not believe he could induce God to heal her at the time he made the statement. The evidence tended to show that a very large number of people believe, in substance, and effect, that Christian Science is the most effective curative agency known, and that it may be successfully applied to the treatment of all manner of diseases which afflict mankind. The sincerity with which this belief is held was conceded by the plaintiff in her testimony. She offered no evidence tending to show that the defendant did not in all sincerity entertain this belief. If she had offered evidence that Christian Science treatment had never been successfully applied, or that no attempt had ever been made to apply it, to the treatment of chronic appendicitis, or that the defendant had never applied such treatment to any disease or that disease with success, or had never known of

such a case being successfully so treated, there would have been evidence of negligence in the defendant's attempt to treat her in the way he did and in the advice which he gave her; or it could be found that he intended to deceive her, for there would then have been direct evidence that he told her as a fact what he did not know to be true. It is clear that the plaintiff cannot stand upon the universal experience of mankind, to be found by the jury from their knowledge of human affairs, when her undisputed evidence and her own admissions tend to establish that a very large number of people honestly entertain the views which she contends are unsound and absurd. Whether the defendant exercised ordinary care, and was honest, were questions vital to the plaintiff's case. Her admission of his sincerity does not tend to prove either proposition. Neither can the plaintiff justly complain that the defendant is not compelled to prove as matter of defense the existence of a system of Christian Science treatment applicable to her case, when her own evidence admits the existence of such a system, and the belief in and practice of it in all diseases by a large number of people. The plaintiff fails because of the insufficiency of her evidence to prove the facts necessary to maintain her case.

Exceptions overruled.

CHAPTER XI.

NELSON vs. HARRINGTON

Nelson, by guardian ad litem, vs. Harrington, 72 Wis. p. 591.

The case of *Nelson vs. Harrington* was the first case which decided what had to be proven to constitute a school of medicine. This case is the basis of all our law on that subject and is quoted and followed everywhere.

This is an action brought to recover damages for the alleged malpractice of the defendant as a physician. The substance of the complaint is that for several years before September, 1885, the defendant had been engaged in the practice of medicine and surgery in the city of Madison, and during all that time advertised and held himself out to the public as a physician, and attended to all such diseases and ailments of the human body as a physician is usually called upon to treat, and such as are ordinarily treated by physicians of good standing and repute in said city of Madison; that he also gave out that he possessed some mysterious power, insight or skill not possessed by physicians in general, and for that reason could cure diseases generally thought to be incurable, and could relieve ordinary diseases and ailments more speedily and effectually than other physicians in good standing and repute as such; that shortly before September 1, 1885, the plaintiff, Thomas Nelson (then about fifteen years of age), was afflicted with some disease of his right hip, and on or about that date his father called the defendant, as such physician, to attend him and treat him for said disease; that the defendant undertook to attend the plaintiff as a physician, and treat and care for him in a proper manner as such physician, but that, disregarding his duty in the premises, the defendant wrongfully and carelessly failed to make

a proper or ordinary examination of the plaintiff, such as a physician of ordinary skill, care, or prudence would have made, and pronounced said disease to be rheumatism when it was in fact a disease of the hip joint, which disease has well-known peculiar signs and symptoms, which a physician of ordinary skill and care would at once detect; that there are well known and acknowledged remedies for such disease, which all physicians of ordinary skill and prudence invariably use in the treatment thereof; that the defendant, in disregard of his duty as such physician, negligently and unskilfully treated the plaintiff for rheumatism and not hip-joint disease, and continued so to treat him until about the middle of the following January; that during such time the defendant encouraged the plaintiff to walk persistently and use his right leg in walking, asserting that walking was beneficial to him; that the plaintiff grew constantly worse under such treatment, until he could not walk, and suffered great pain and distress during the time, but the defendant constantly asserted, when told he was getting worse, that he was in fact getting better; that in January, 1886, after the plaintiff had wholly lost the use of his leg, other physicians were called in, and by most persistent and thorough medical treatment the plaintiff has to some extent recovered the use of his leg, but will be a cripple for life; that if the defendant had treated the plaintiff properly he would have been speedily and completely restored to health, and would have recovered the full use of his leg, also that he would have been relieved in a great measure from the suffering he was compelled to endure.

The defendant answered that, during the time stated in the complaint, he had been what is commonly known and understood as a spiritualist and clairvoyant physician, and as such has treated diseases and ailments of the human body and prescribed for patients calling upon him for treatment; most of his practice having been in and about the city of Madison. The answer proceeds as follows: "That on the 1st day of September, 1885, the said plaintiff, in person or by his father, Tollef A. Nelson, called upon this defendant for treatment for some ailment of which he, the said

plaintiff, was then suffering; but defendant alleges that whatever treatment he gave the said plaintiff was strictly in accordance with the ordinary and customary practice and system of practice as used and employed by spiritualists and clairvoyants in diagnosing, attending and prescribing for diseases and ailments of the human body, and that he was employed by the said plaintiff and the said Tollef A. Nelson to treat the said Thomas Nelson only as a spiritualist and clairvoyant, and not in any manner as an ordinary physician or surgeon possessed of the ordinary knowledge or skill belonging to physicians and surgeons and doctors of medicine in the regular schools of practice; that the said Tollef A. Nelson and the said Thomas Nelson both well knew the manner of diagnosing and prescribing for diseases employed by this defendant, and well knew that this defendant employed no other and had no other manner or method of determining or diagnosing diseases and ailments of the human body, before the said plaintiff came to this defendant; that said plaintiff came to this defendant desiring and expecting this defendant to diagnose said disease and prescribe for the same as a spiritualist and clairvoyant physician. Defendant further alleges, on information and belief, that the said Thomas Nelson was, at the time of said treatment, afflicted with some rheumatic affection of his limb and hip, from which he had been suffering for a long time prior to calling this defendant to treat said ailment."

The case was tried by a jury and resulted in a verdict and judgment for the plaintiff. The testimony and proceedings on the trial, so far as the same are essential to an understanding of the exceptions considered, are sufficiently stated in the opinion. The defendant appeals from the judgment.

For the appellant there was a brief by Rogers & Hall and G. W. Bird, and oral argument by E. W. Hall. They contended, *inter alia*, that an action of malpractice is essentially an action on contract. *Whittaker vs. Collins*, 34 Minn. 299. The undertaking of the physician is that he will treat the patient according to the system or school which he professes and avows, and that

he will use due care and skill according to the practice of that system or school. 3 Whart & S. Med. Jur. secs. 751, 769; Shearm. & Redf. on Nef. secs. 437, 435; Whart. on Neg. sec. 733; *Corsi vs. Maritzek*, 4 E. D. Smith, 1; *Bowman vs. Wood*, 1 Greene (Iowa), 441; *Comm. vs. Thompson*, 6 Mass. 134; *Patten vs. Wiggin*, 51 Me. 594; *McKleroy vs. Sewell*, 73 Ga. 657; Story on Bailm. sec. 435. The remarks of counsel, persisted in after objection by defendant and admonition by the court, could have no other effect than to seriously prejudice the defendant, and should work a reversal of this judgment. *Brown vs. Swineford*, 44 Wis. 282; *Kaine vs. Omro*, 49 id. 371; *State vs. Clifford*, 58 id. 113, 124; *Elliott vs. Espenhain*, 59 id. 272; *Baker vs. Madison*, 62 id. 137.

For the respondent there was a brief by Pinney & Sanborn, and oral arguments by S. U. Pinney. They contended, among other things, that a person who assumes to be competent to treat a disease, and holds himself out to the public as such, is liable for any ignorance or negligent treatment thereof. *Pippin vs. Shephard*, 11 Price, 400; *Wilmont vs. Howard*, 39 Vt. 447; *Musser's Ex'r vs. Chase*, 29 Ohio St. 577; *Patten vs. Wiggin*, 51 Me. 594; *Tefft vs. Wilcox*, 6 Kan. 46; *Smothers vs. Hanks*, 34 Iowa, 286; *Carpenter vs. Blake*, 60 Barb. 488; S. C. 50 N. Y. 696. Physicians who offer themselves to the public as practitioners, impliedly promise that they will use their best skill and judgment in ascertaining the nature of the malady and the mode of treatment best calculated to cure. *Reynolds vs. Graves*, 3 Wis. 416; *Patten vs. Wiggin*, 51 Me. 594; *Bellinger vs. Craigie*, 31 Barb. 534; *Sumner vs. Utley*, 7 Conn. 257; *Wood vs. Clapp*, 4 Sneed, 65; *Landon vs. Humphreys*, 9 Conn. 209; *Long vs. Morrison*, 14 Ind. 596; *McCandless vs. McWha*, 22 Pa. St. 261. It is immaterial whether or not the defendant is a licensed medical practitioner, provided he professes to be skilled in medicine and actually treats patient. *Musser's Ex'r vs. Chase*, 29 Ohio St. 577; *Rex vs. Spiller*, 5 Car. & P. 333; *Carpenter vs. Blake*, 60 Barb. 488; *Rev. vs. Long*, 4 Car. & P. 398. When the case will admit of but one mode of treat-

ment, the use of a different treatment is evidence of want of skill. A physician must conform to the established mode of treatment; if he departs from it he does so at his peril. *Carpenter vs. Blake*, 60 Barb. 488; *Patten vs. Wiggin*, 51 Me. 594. "The law has no allowance for quackery. It demands qualifications in the profession. He is bound to exercise his art or profession rightly and truly as he ought; for less than this he will be liable in damages." *Almond vs. Nugent*, 34 Iowa, 300; *McCandless vs. McWha*, 22 Pa. St. 261; *Rex vs. Long*, 4 Car. & P. 398; *Rex vs. Van Butchell*, 3 id. 629.

Lyon, J. The question has been raised whether this is an action for the breach of a contract, or one sounding in tort for the alleged unskilful and negligent manner in which the defendant, as a physician, performed his duty to the plaintiff. Although the complaint alleges the implied contract of the defendant to treat the plaintiff in a skilful and proper manner, yet the gravamen of the action is alleged to be that the defendant disregarded his duty in the premises by negligently, wrongfully, and carelessly failing to make a proper diagnosis of the plaintiff's disease and to prescribe remedies therefor. These allegations characterize the action. They show it to be solely for a breach of defendant's duty as a physician, founded upon his legal obligations as such, without reference to the implied contract. The contract is stated in the complaint as mere matter of inducement, and might as well have been omitted. It must be held, therefore, that the action is for the breach of duty,—the negligence and wrong,—and not upon the contract.

Wood vs. M. & St. P. R. Co., 32 Wis. 398.

The general rule of law is that a physician or surgeon, or one who holds himself out as such, whether duly licensed or not, when he accepts an employment to treat a patient professionally, must exercise such reasonable care and skill in that behalf as is usually possessed and exercised by physicians or surgeons in good standing, of the same system or school of practice, in the vicinity or locality of his practice, having due regard to the advanced state

of medical or surgical science at the time. This rule is elementary. It has its foundation in most persuasive considerations of public policy. Its purpose is to protect the health and lives of the public, particularly of the weak or credulous, the ignorant or unwary, from the unskilfulness or negligence of medical practitioners, by holding such practitioners liable to respond in damages for the results of their unskilfulness or negligence. Citation of authorities to support the rule would be superfluous. It was substantially (perhaps not so fully) laid down and applied in *Gates vs. Fleischer*, 67 Wis. 504, and is sustained by numerous cases, many of which are cited in the briefs of counsel on both sides.

The defendant is what is known as a clairvoyant physician, and held himself out, as other physicians do, as competent to treat diseases of the human system. He did not belong to, or practice in accordance with the rules of, any existing school of physicians governed by formulated rules for treating diseases and injuries, to which rules all practitioners of that school are supposed to adhere. The testimony shows that his mode of diagnosis and treatment consisted in voluntarily going into a sort of trance condition, and while in such condition to give a diagnosis of the case and prescribe for the ailment of the patient thus disclosed. He made no personal examination, applied no tests to discover the malady, and resorted to no other source of information as to the past or present condition of the plaintiff. Indeed, he did not profess to have been educated in the science of medicine. He trusted implicitly to the accuracy of his diagnosis thus made and of his prescriptions thus given.

The general rule above stated requires of one holding himself out as a physician the exercise of the same skill and care as is ordinarily exercised by physicians in good standing who belong to the same school of medicine and practice under the same rule. To constitute a school of medicine under this rule, it must have rules and principles of practice for the guidance of all its members, as respects principles, diagnosis, and remedies, which each member is supposed to observe in any given case. Thus, any

competent practitioner of any given school would treat a given case substantially the same as any other competent of the same school would treat it. One school may believe in the potency of drugs and blood-letting, and another may believe in the principle *similia similibus curantur*; still others may believe in the potency of water, or of roots and herbs; yet each school has its own peculiar principles and rules for the government of its practitioners in the treatment of diseases. Not so, however, with clairvoyant practice. True, the practice has but one mode of ascertaining what the disease is and the remedy therefor. This mode has already been stated. But the mode in which a physician acquires a knowledge of his profession has nothing to do with his school or system of practice. One person may acquire such knowledge from certain books; another from certain other books, which perhaps teach different principles; still another from oral communications, as lectures, etc., or from experience alone; and still another from his intuitions when in an abnormal mental state; yet these differences do not necessarily constitute separate schools of medicine. The clairvoyant and the practitioners of the allopathic or homeopathic system may belong to the same school or system, provided they adopt the same principles and observe the same rules of treatment. The methods by which a man acquires a knowledge of medical science is one thing, and the principles and rules which govern him in the practice of medicine is another and very different thing. This is just the difference between clairvoyant physicians as a class and the practitioners of a school or system of medical practice recognized in the general rule of professional ability above laid down. The regular physician of any school or system acquires his professional knowledge by the study of the general principles of the science, and applies such knowledge to each particular case as it arises, while the clairvoyant physician may have no such general knowledge, but believes himself especially and effectually educated to treat each particular case as it is presented to him, without reference to any particular system or school.

These observations dispose of the exceptions based upon the rejection of testimony offered to show that the defendant practiced only as a clairvoyant physician. That was conclusively proved before, and the rejection of the testimony (if material under other circumstances) was of no importance. It should be observed that the answer of the defendant does not allege, and no testimony was given or offered to show, that clairvoyant physicians, as a class, treat diseases upon any fixed principles, or that rules have been formulated which each practitioner is supposed to follow in the treatment of diseases, as is the case with the schools or systems of medicine before mentioned. Clairvoyant physicians have a common mode of acquiring their knowledge of cases, but their methods of treatment may be contradictory and as numerous as are the practitioners, and no principle or rule of clairvoyant treatment be violated thereby.

The proposition that one holding himself out as a medical practitioner and as competent to treat human maladies, who accepts a person as a patient and treats him for disease, may, because he resorts to some peculiar method of determining the nature of the disease and the remedy therefor, be exonerated from all liability for unskilfulness on his part, no matter how serious the consequences may be, cannot be entertained. The proposition, if accepted as true, would, as already suggested, contravene a sound public policy.

It matters not that the patient, or those who are responsible for him, know the methods of the practitioner. The responsibility for malpractice must still be laid upon the latter. It should be stated in this connection that the father of the plaintiff, who employed the defendant to treat his son, testified that he so employed him because he believed him to be a skilful physician; that he did not depend on the trance business, but on the defendant, the same as he would on any other physician; and that he believed in him because he had performed remarkable cures.

It follows that the court properly refused to give an instruction proposed on behalf of the defendant in these words: "If the

defendant was a clairvoyant physician, and professed and held himself out to be such, and the plaintiff and his parents knew it, and at the time he was called to treat the plaintiff both parties understood and expected that he would treat him according to the approved practice of clairvoyant physicians, and that he did so treat him, and in strict accordance with the clairvoyant system of practice, and with the ordinary skill and knowledge of that system, then the plaintiff cannot recover, and your verdict must be for the defendant." Instead of the words, "with the ordinary skill and knowledge of that system," employed therein, it should read, "with the ordinary skill and knowledge of physicians in good standing, practicing in that vicinity."

Since the cause was argued our attention has been called to the late case of *Wheeler vs. Sawyer*, decided by the supreme judicial court of Maine, and reported in 15 Atl. Rep. 67. The statutes of Maine allow any person to practice medicine who has obtained from the municipal officers of the town in which he resides a certificate of good moral character. The plaintiff had such certificate, and practiced according to the principles and methods of those calling themselves "Christian Scientists." The case shows that practitioners of Christian Science use no medicines, and the plaintiff used none. It has now become common knowledge that their treatment is entirely mental. The action was for professional services. The objection to a recovery were "that the so-called 'Christian Science' is a delusion; that its principles and methods are absurd; that its professors are charlatans; that no patients can possibly be benefited by their treatment." The court held all this immaterial, and said, in substance, that the patient got all he bargained for, and must pay for it the agreed price. There is no question of liability for malpractice in the case. On the contrary, the patient said he was improved under the treatment. Were the defendant in the present case authorized by law to practice medicine, and should a patient employ him to go into a clairvoyant state, and while in such state to tell him his malady and the remedy therefor, and agree to pay him a certain

sum of money for such services, and were the defendant to render the service, doing the patient no injury, but a benefit rather, an action brought by the defendant to recover the stipulated compensation would be like the Maine case. We perceive no valid objection to a recovery by a plaintiff in either case. It goes without saying that we have here no such case for determination, and the Maine adjudication does not aid us.

We have not been referred to any case in the books of an action for malpractice against a clairvoyant physician (so called) and have found none. It is cause for surprise if no such case has arisen; for it is believed that this method has been employed quite extensively for many years in different parts of the country. Whether the absence of such cases is to be accounted for on the theory that the bar and public have generally believed that this class of physicians are not legally responsible for want of skill, or because no member of it has been guilty of malpractice, or upon some other theory, is not here determined. Probably the fact that such cases have not come before the court is not very significant. For want of them, however, we have been compelled to decide this case solely in the light of elementary rules of law, which perhaps furnish just as safe basis for judgment. In this connection brief reference will be made to a case cited by counsel for defendant in his argument which then impressed us as being nearer in point than any other case cited. It is that of *McKleory vs. Sewell*, 73 Ga. 657. The court sustained an instruction to the jury in these words: "If a man sends for a doctor, and the doctor treats the patient while he, the doctor, is intoxicated, and the patient afterwards calls in said doctor and continues to employ him, it would be a waiver of all objections to the doctor on account of his habit of intoxication." The language of this instruction (copied in the brief of counsel) seemed broad enough to cut off an action for malpractice. On looking into the case, however, we find the action, like the Maine case, was by a physician to recover for professional services. The court said: "Surely, one cannot object to a doctor's bill on account of past

intoxication, when he keeps him as a family physician for years afterwards." It is strongly intimated in that case that the defendant might recoup in the action for damages caused by malpractice. If so, he might maintain an independent action for such damages. Hence the case is not in point and throws no light on the present case.

The claim that the defendant belonged to and treated the plaintiff in accordance with the principles and rules of a particular school of medicine, and is relieved from liability in this action because thereof, having been negatived, the law applicable to the case may, we think, be correctly summarized as follows: One who holds himself out as a healer of diseases, and accepts employment as such, must be held to the duty of reasonable skill in the exercise of his vocation. Failing in this, he must be held liable for any damages proximately caused by unskilful treatment of his patient. This is simply applying the rule of liability to which all persons are subject who hold themselves out, and accept employment, as experts in any profession, art or trade. The theory upon which an expert practices his profession, art or trade, the sources from which he derived his knowledge of it, the tools and appliances he employs in the exercise of his calling, his methods of work, are not controlling considerations. The courts pass no judgment upon these matters. They look only to results. Thus, a person may rely entirely upon his genius or normal intuitions for some line of mechanical work, and hold himself out as an expert, and accept employment therein, without previous training or practice. The law holds him responsible if he does his work unskilfully, although he does the best he can. He takes the risk of the quality or accuracy of his genius or intuitions. On the same principle one who holds himself out as a medical expert, and accepts employment as a healer of disease, but who relies exclusively for diagnosis and remedies upon some occult influence exerted upon him, or some mental intuition received by him when in an abnormal condition, in like manner takes the risk of the quality or accuracy of such influence or intuition. If these move

him so imperfectly or inaccurately that, although he pursues the course of treatment thus pointed out or indicated to him, he fails to treat the patient with reasonable skill, he is liable for the consequences. The only difference in the two cases is, the mechanic acts under normal, and the physician acts under abnormal, influence or intuitions. The law does not concern itself with the quality of the mechanic's genius, or with the reality or nature of such alleged occult influence or intuition which controls the physician in his treatment of his patient. It only takes cognizance of the question, Did the practitioner or expert render the service he undertook in a reasonably skilful manner? That question, as applied to the defendant, the jury, upon sufficient proofs, have answered in the negative.

As to the alleged negligence of the defendant in his treatment of the plaintiff, it is enough to say that any person who is legally responsible for his conduct is liable for all damages suffered by another which are the proximate result of his negligence or want of ordinary care. Of course, the defendant is subject to this rule; and here it may be observed that negligence cannot properly be imputed to the father of the plaintiff because he employed the defendant to treat his son, with full knowledge of the defendant's methods of diagnosis and prescription. At least, the defendant cannot be heard to charge the father with negligence in that behalf.

Perhaps a medical practitioner may protect himself from liability for unskilfulness by a special contract with his patient that he shall not be so liable; but in the absence of such a contract the practitioner must be held to his common law liability. This rule was applied to a common carrier in *Conkey vs. M. & St. P. R. Co.*, 31 Wis. 619. Dixon, C. J., there said: "I think, in the absence of special contract or agreement to the contrary, the true policy of the law, now as much as ever and even more, is to adhere to the strict rules of liability on the part of common carriers established by the common law." Page 633. The reasons which there prevailed for adhering to that rule, and thus vindicating a sound

public policy, are much more cogent in the case of the physician who deals with health and life instead of property.

The charge of the court to the jury, so far as we are able to perceive, is in strict accord with the views herein expressed. It is unnecessary to set it out at length. The testimony tends to show negligence and unskillfulness on the part of the defendant in his treatment of the plaintiff, and support the verdict. Hence the judgment should not be disturbed unless some material error was committed on the trial. Some of the exceptions have already been determined. Those not passed upon will now be briefly considered.

The defendant offered in evidence a deposition of plaintiff's father taken in a case brought by the father against the defendant for loss of his son's services, etc., caused by the same malpractice here complained of. The court rejected the deposition as evidence in chief, but offered to receive it as evidence impeaching the testimony of the father, who had theretofore been examined as a witness on the trial in behalf of the plaintiff. The ruling was clearly right. It was an offer to prove the statements of a witness made at another time and place in a different cause, as evidence in chief against the plaintiff. Of course, such evidence is inadmissible.

Certain objections were taken to remarks of counsel in argument. It was proved that the defendant placed the abbreviation "Dr." on his sign and prescriptions. Counsel said that when he did so he violated the laws of Wisconsin. The remark is not a very serious one, at most, even if not true. We think, however, that it is a fair inference from the allegations of the answer, and from the proofs, that the defendant was not a regularly authorized medical practitioner under the laws of this state. The only other objection of this character is that counsel for the plaintiff also commenced to comment to the jury on the fact that the defendant and certain physicians who were present in court had not been called by the defendant as witnesses. The judge expressed his disapprobation of this line of remark, and instructed the jury, in

his general charge that they were to draw no presumptions from the fact that those persons were not called as witnesses. We are unable to perceive how the defendant could possibly be prejudiced by the remark of counsel, thus promptly disapproved and counteracted. Besides, it is quite probable that counsel had the right to make such comment.

This disposes of all the exceptions upon which error is assigned adversely to the defendant.

BY THE COURT.—The judgment of the circuit court is affirmed.

CHAPTER XII.

ENNIS vs. BANKS

The case of *Ennis vs. Banks*, which is also a leading case, is reproduced here to give the practitioner some idea of malpractice trial. In this case a homeopath was trying to testify against an allopath.

Ennis vs. Banks, et al., 164 Pac. Rep. 58.

This is the second appeal in this case. When it was here before, on appeal from a judgment for \$1,500 in favor of the plaintiff, it was reversed because of the admission of certain instructions to the jury. It was remanded for a new trial. 88 Wash. 237, 152 Pac. 1037. The issue in the case was whether the appellant was guilty of malpractice in giving a diet of poached egg and toasted bread to a typhoid fever patient. Upon this issue, the case was retried to the court and a jury, and resulted in a verdict and judgment against the defendants for \$9,000. The defendants have appealed from that judgment.

The facts are substantially as follows: The defendant Rush Banks, is a physician, practicing his profession in the city of Centralia. On December 22, 1914, he was called to the home of Donald Ennis, whom he found suffering with typhoid fever. On the next day, Mr. Ennis was removed to a hospital which was being conducted by Dr. Banks. From that time on until January 14, 1915, Mr. Ennis was treated by Dr. Banks. Mr. Ennis was attended by a nurse, who cared for him constantly during that time. From the time Mr. Ennis was taken to the hospital until the 14th day of January, 1915, he was a very sick man. Gas would accumulate, almost constantly, in his stomach and bowels, and, on the 11th day of January, Dr. Banks called in consultation two other doctors. It was then concluded that an operation was

necessary, in order to remove the gas, but Mrs. Ennis, the plaintiff in this case, and the patient's mother would not consent to the operation. The patient, before this time, had been fed upon a milk diet, which apparently did not agree with him, and subsequently had been fed upon beef broth. This latter diet seemed to agree with him better than the milk diet. On the 12th and 13th of January, the patient seemed to be somewhat improved. On the 14th, the doctor caused to be prepared a slice of bread, about three inches square, from which the crust was removed, and which was toasted, soaked in boiling milk until the toast was soft; and an egg was broken in some hot water and allowed to coagulate. This egg was then placed upon the soft toast, and this toast and egg was given to the patient. The patient ate about two-thirds of the egg and toast. About three hours thereafter, an eggnog was prepared, and given to the patient. When the eggnog was administered, the patient vomited the eggnog and the egg and toast which had been administered three hours before. The patient, at that time, seemed to be worse. Mrs. Ennis then became dissatisfied with the treatment of Dr. Banks, and ordered the patient removed to her home, about a block away. The patient was taken from his bed at the hospital, carried out of the room down a flight of stairs to the street, placed on a stretcher, and taken home. Another doctor, practicing the homeopathic method of medicine, was called, and treated the patient two days, when he died, on January 16, 1915. Afterwards, this action was brought. The basis of the action is malpractice, alleged to be the cause of the death of Donald Ennis, by reason of the feeding of the poached egg and toast.

The appellants very forcibly argue that the trial court should have granted a judgment notwithstanding the verdict, for the reason that the verdict of the jury is based upon speculation and conjecture, and that if the appellant, Dr. Banks, made any mistake, it was an error of judgment, and not a negligent act. But for the fact that these same questions were presented upon the

other appeal, and the case was remanded for a new trial, we are satisfied that there is merit in these points.

The evidence very conclusively shows that the patient, during the time he was under the charge of Dr. Banks, was a very sick man. Whether the feeding of this toast and egg was the primary cause of his death is open at least to very serious doubt. The evidence shows that Mr. Ennis' death may have been due to one of three causes: First, the disease itself; second, the carrying of the patient from the hospital to another place; and, third, the change of diet. But, under the rule established when the case was here before, we are constrained to hold it was for the jury to determine which of these causes resulted in his death, and whether the doctor, in administering the toast and egg, as hereinbefore stated, was guilty of malpractice. The evidence upon this trial was substantially the same as upon the other trial, and upon the other appeal we used this language:

"The appellant urges that the trial court should have granted his motion for a nonsuit at the close of the respondent's case. There was, however, evidence that the toast and egg diet was, under the circumstances, an improper treatment. Dr. Blair so testified. This was evidence that the specific act alleged was negligent, and this evidence should have been submitted to the jury under proper instructions."

So it is plain that the facts shown upon this trial were sufficient to take the case to the jury. In other words, that statement of the rule became the law of the case.

Pattison vs. Seattle, Renton & Southern Railway Co., 64

Wash. 370; 116 Pac. 1089, 35 L. R. A. (N. S.) 660.

Provine vs. City of Seattle, 70 Wash. 326, 126 Pac. 927.

Hendrickson vs. Simpson Logging Co., 77 Wash. 276,
137 Pac. 444.

City of Chehalis vs. Cory, 64 Wash. 367; 116 Pac. 875.

The appellants also argue that the instructions were erroneous. The court, after defining the issues, instructed the jury as follows:

“(Instruction No. IV. With the issues thus made up I instruct you that before the plaintiff can recover in this case she must establish by a preponderance of the evidence that the defendant—Rush Banks was either guilty of negligence in the treatment of the case, or that he did not exercise ordinary skill and competence in the treatment thereof, and that such negligent acts or omissions or said want of proper and ordinary skill, or both, were the proximate cause of the death of said Donald Ennis.)

“Instruction No. V. The Court instructs you that the implied contract of the defendant when he assumed charge of the treatment of plaintiff's injuries was that he possessed and would employ in the treatment of the case such reasonable skill and diligence as were ordinarily exercised in his profession at and in localities similar to that in which he practiced, by the members as a body; that is, the average of the reasonable skill and diligence ordinarily exercised by the profession at the time and in places similar to Centralia. REGARD IS TO BE HAD IN DETERMINING THIS ORDINARY SKILL AND DILIGENCE TO THE IMPROVEMENT AND ADVANCED STATE OF THE PROFESSION AT THE TIME THE CASE WAS TREATED.

“Instruction No. VI. I charge you, members of the jury, that when the defendant Rush Banks undertook as a physician and surgeon to treat and care for Donald Ennis, the deceased husband of the plaintiff, the law required of him no more than that he should exercise that degree of knowledge, skill and care which physicians and surgeons practicing in this vicinity and similar localities ordinarily possess (and if you should find from the evidence that in his treatment of the said Donald Ennis, the defendant Rush Banks did not use and exercise as high a degree of knowledge, skill and care as is ordinarily used and possessed by physicians and surgeons practicing in this and similar localities, and as a result thereof the said Donald Ennis was injured and from those injuries he died, your verdict must be for the plaintiff).

“Instruction No. VII. While it is true that a physician is not

liable for what is commonly called a mistake in judgment or a mistake in diagnosis (yet if you should find from a fair preponderance of the evidence in this case that the defendant Rush Banks failed to exercise his best judgment, that is, the judgment which a physician of ordinary care, skill and intelligence in the same or similar localities would have used under like circumstances, then I charge you that the defendant cannot escape his negligent acts because of his failure to use his best judgment, and if you should find that the act, or acts, of the said defendant Rush Banks when he failed to use his best judgment, as I have hereinabove instructed you, approximately contributed to the death of Donald Ennis, then your verdict must be for the plaintiff.)”

The parts of these instructions which we have indicated by parentheses should not have been given, because they are instructions upon general negligence, not within the issues of the case, and, in effect, tell the jury that, for want of ordinary care generally, the doctor is liable. When the case was tried before, the court admitted evidence of other acts, which were claimed to be negligent, and which acts were not within the issues, and, for that reason, the case was reversed. The act constituting malpractice, complained of here, and the only act complained of, was the administering of milk toast and soft-poached egg. No other negligence is alleged. Under these instructions, which we have quoted above, the jury were led to believe that they might consider any acts of negligence, or general acts, and make up their verdict outside the issues of the case. Instruction No. V, above quoted, is subject to another objection, namely, that the part underscored, to the effect that in determining ordinary skill and diligence, the advanced state of the profession at that time might be considered. There was no evidence in the case that there was any advanced state of the profession at that time, and, of course, the jury were not authorized to take that fact into consideration in determining want of care on the part of the physician. That part or the instruction was misleading.

The court, at instructions Nos. X and XI, used the following language:

"Instruction No. X. You are instructed if you should find from a fair preponderance of the evidence that the defendant Rush Banks did not follow such established practice in the case and treatment of the deceased, Donald Ennis, as is recognized, adopted and followed by other physicians and surgeons in good standing, practicing in this and similar localities, and as a result thereof the said Rush Banks contributed or hastened the death of Donald Ennis, then I charge you that he is liable to the plaintiff in damages.

"Instruction No. XI. In connection with the last mentioned instruction I desire to charge you that the rule of law is in such cases as this, as follows: 'When a cause is shown which might produce an accident in a certain way, and an accident happens in that manner, it is a warrantable presumption in the absence of showing of other cause that the one known was the operative agency in bringing about the result.' "

These instructions were clearly erroneous. The evidence in this case shows that Dr. Banks was known as an allopathic doctor. One of the doctors who testified that the treatment given by Dr. Banks was improper was a physician of the homeopathic school of medicine, and admitted that his system of treatment was different from that of Dr. Banks, or the allopathic school.

The first of these last quoted instruction told the jury, in substance, that, if Dr. Banks did not follow the practice recognized by other physicians in good standing in that locality, and, as a result thereof, hastened the death of Donald Ennis, the respondent was entitled to recover, which, of course, is not the law. Each school of medicine is entitled to practice in its own way, and because one does not use the methods of the other is no reason for holding the one for malpractice. In the case of *Dahl vs. Wagner*, 87 Wash. 492, 151 Pac. 1079, we said:

"It has been the uniform holding of this court that where doctors of equal skill, and learning, being in no way impeached or

discredited, disagree in opinion upon a given state of facts that the courts cannot hold a defendant in a malpractice suit to the theory of the one to the exclusion of the other. This is the logic of *Brydges vs. Cunningham*, 69 Wash. 8, 124 Pac. 131. It is enough if the treatment employed 'have the approval of at least a respectable minority of the medical profession who recognize it as a proper method of treatment' *Lorenz vs. Booth*, 84 Wash. 550; 147 Pac. 31. The reason is obvious. A man who is called upon to exercise professional judgment is bound only to the exercise of reasonable skill and learning and diligence. 'He is not liable for mistakes if he uses the method recognized and approved by those reasonably skilled in the profession' " (citing authorities).

So, it is apparent that this instruction was erroneous and misleading.

Instruction No. XI, to the effect that when a cause is shown that might produce an accident in a certain way, and an accident happens in that manner, it is a warrantable presumption, in the absence of showing of other cause, that the one shown was the operative agency in bringing about the result, had no place in this case. There was no accident here. Mr. Ennis either died from natural causes, or from being removed from the hospital, or he died from malpractice. There was no occasion, therefore, for giving this instruction.

The appellants contend that instruction No. XX, with reference to the effect to be given to the testimony upon hypothetical questions, was erroneous. We are satisfied that the instruction was not as complete as it should be, but, since no exception was taken to the instruction, we shall not consider it further.

The instructions, taken as a whole, were voluminous. There were 24 instructions, covering 11 pages of typewritten matter. They were long and cumbersome, and had a tendency more to mislead, than to enlighten, the jury. The issue in the case was a simple one. It ought to have been covered in, at most, a half dozen instructions, to the points that unless the jury could say that the patient died solely from the effect of the soft toast and

egg which was administered to him, and not from the disease, or from being carried from the hospital, at the stage of the disease he was then in, there could be no recovery; that there could be recovery only in case the giving of the toast and egg was the prime cause of the patient's death, and the doctor knew, or should have known, such result would follow. Before the respondent would be entitled to recover for malpractice, the jury ought to have been told that they must find that Dr. Banks did not use his judgment in administering the egg and toast, under the circumstances, but was guilty of malpractice in administering such toast and egg at that time. A few simple instructions upon these questions, in addition to those ordinarily given, were sufficient for the jury.

The appellants further argue that the court erred in not granting a new trial because of misconduct of the jury, in arriving at their verdict, for the reason that the result of the verdict was a quotient verdict, and not based upon the judgment of the jurors, and for the further reason that the verdict and judgment are excessive. There is merit in both these contentions; but, in view of the fact that a new trial must be granted for errors in the instructions, we shall not discuss them.

The judgment is reversed, and the cause remanded for a new trial.

CHAPTER XIII.

STATE vs. SMITH

The case of *State vs. Smith*, 25 Id. 541, 138 Pac. 1107 is a case where an osteopath was being tried for manslaughter on the evidence of allopath physicians. This case is instructive as to the reasoning on schools or systems of medicine and also on manslaughter.

State vs. Smith, 25 Id. 541; 138 Pac. 1107, 1914.

Defendant, an osteopath, on trial for manslaughter. It is next contended that the Court erred in allowing certain physicians to testify as expert witnesses as to whether or not the treatment employed by the accused was such as a physician of ordinary skill exercising due care would employ in such a case.

The particular question was propounded to one of the doctors and to which exception is taken was as follows: "Q. I will ask you, doctor, would the means employed in the treatment of the deceased, Miss Clara Foy, as narrated and stated to you by the defendant, Dr. Smith, as the treatment he employed, be such as a physician in this community, meaning thereby Elinore County having competent skill and employing due care and attention, would have used in treating the case?" It was clearly erroneous for the court to permit physicians of a different school to testify as experts in a case of this kind as to the corrections and professional skill of the treatment administered. It appears that the appellant herein was a duly licensed osteopathic physician and that he professed to treat patients under the methods and practices of that school and not in accordance with what is known as the regular or allopathic school or any other school for the treatment of diseases. It seems to be a sound and reasonable rule and well estab-

lished by authorities that the treatment of a physician of one particular school is to be tested by the general principles and practice of his school and not by those of other schools, and that a physician or surgeon is bound to exercise such reasonable care and skill as is possessed and exercised by physicians and surgeons generally in good standing of the same school of practice or treatment in the locality and community of his practice having regard to the advanced state of the school or science of treatment.

These are times of advanced science and liberal thought when every person may think and act for himself. Every community has its multitude of beliefs and modes of treatment of diseases and human ailments, and every citizen is absolutely free to adopt, believe or employ anyone he pleases. If the results are not what he would wish or the rest of the community think they ought to be, he can nevertheless not be hauled into court and have his method of treatment and his school of thought tested by the disciples or experts of some other school or belief. It would be disastrous to an allopath to try him by tests the homeopath, the osteopath, the eclectic or mental science healer would apply and it would likewise be dangerous to the osteopath to require of him an observance of the rules applied by any of the other enumerated. When a patient selects anyone of the many schools of treatment and healing to serve him, he thereby accepts and adopts the kind of treatment common to that school or class, and the care and skill and diligence with which he is treated, when questioned in a court of justice should be tested by the evidence of those who are trained or skilled in that school or class.

CHAPTER XIV.

WILKINS vs. BROCK

Wilkins vs. Brock is an osteopathic case and is reproduced here to show the importance of proving the existence of the School of Chiropractic.

The reader will also observe the feeling of the allopath physicians against the osteopaths.

Wilkins vs. Brock, 70 Atlantic Reporter, 572.

This is an action for malpractice as physicians. The declaration contains a count in trespass for assault and battery, and two counts in case. At the close of all the testimony the count in trespass was ruled out, there being no evidence to support it, and the case submitted only on the other counts. The defendant Roselle let judgment go by default. The defendant Brock pleaded not guilty, and the issue was tried by jury and found for the plaintiff, and damages assessed against the defendants jointly, by direction of the court, the defendant Roselle not appearing. To this the defendant Brock excepted, and objects that Roselle was not a party on trial, and stood as though she had never been a party to the action, and that he was prejudiced by bringing thus prominently before the jury that she had admitted her guilt, as the jury would be likely to think that, as she was guilty, he was also, as they joined in the treatment complained of.

The plaintiff claimed, and the testimony on his part tended to show, that about the 1st of September, 1898, the intestate was in a condition of exhaustion of the nervous system, a functional disease called neurasthenia, which had been coming on for three months, and that the defendant treated her therefor about six weeks, ending the 12th of October following; that the last treatment was such that it caused "general myelitis from traumatic

origin," an organic disease of the spinal cord or its membranes, which betrayed itself at once by pain in the back, inability to walk without assistance, and the like, and from which she thenceforth languished, and languishing died in March, 1900. The plaintiff introduced in his opening the testimony of a large number of witnesses, some of whom are named in the bill of exceptions and some not, but referred to as "many others," for the purpose of showing in a general way the good health of the intestate for 20 years or more prior to three months next before the defendant began to treat her, and her bad health ever after her last treatment. The exceptions say that "this testimony was admitted under the circumstances, and subject to the objections and exceptions appearing in the record," and a transcript of the testimony is referred to and made a part of the bill of exceptions, but the bill affords no other means of finding out what those circumstances, objections, and exceptions are. Nor do the defendant's counsel aid us in this respect, for they point out nothing to enable us to find what the transcript contains on the subject, but leave us to search it for ourselves. But this court does not search the transcript for exceptions referred to in this way. The bill of exceptions should show what the exceptions are, and would, if drawn according to the rule in such case made and provided; but if it does not, and the transcript is referred to for them, they will be noticed only so far as counsel point them out specifically in their brief.

To meet the testimony thus introduced, the defendant introduced testimony tending to show that from 1890 to September, 1898, when he began to treat her, the intestate was at times infirm in health, unable to walk, had symptoms of paralysis of the lower limbs, backache, and total disability at times, was injured in a carriage accident before 1890, and suffered in the same way from that; was injured by overwork in 1892-93, which rendered her unable to walk without assistance for a time; that at times after that, up to September, 1898, she walked feebly, and with a shuffling gait, and complained of inability to walk, and of pain in her back and limbs; that in the last few months before September she

was unable to walk at all without taking hold of things, shuffled and scuffed her feet, and was unable to work, which was her condition when the defendant began to treat her; and that she improved under his treatment to such an extent that she came to his office alone the last time she was treated, and went away alone, walking to the car. In giving this testimony the witnesses specified the particular times and occasions to which it related.

The plaintiff called in rebuttal several witnesses, who testified to times and occasions, from 1880 to 1898, when the intestate appeared to be well, and not afflicted as the defendant's witnesses testified; and, because it was not, it is objected that their testimony was not admissible as rebutting. This is the only objection. But that is not determinative of the character of the testimony in this respect; for if it tended to show her condition to be different at other times during the period covered by the defendant's witnesses, it tended to show it different at those times, and that it did thus tend cannot be doubted. The plaintiff called a physician, who examined the intestate in February, 1900, to ascertain her condition, and who testified that in making his diagnosis it was necessary for him to know the history of her trouble, and that consequently he elicited from her that her pain at that time, and for some weeks before, was irregular, but located in her back; that the first severe pain she had there was in September or October, 1898, and started suddenly and severely following some treatment, and continued to be severe for over a year; that she received an extremely severe and sudden injury upon her back in September or October, from the effects of which she fainted, followed by unconsciousness, and was unable to walk directly after it. The defendant did not object to the admission of what the intestate said about present pain, but objected to what she said about past pain, when it began, etc., as being "historic narrative." But the court held it admissible, without indicating what use could be made of it, and overruled the objection, to which the defendant excepted.

If some of the statements were admissible, we shall not consider whether others were or not, as the position taken by the defendant does not require it; for he contends generally that, while her statements and complaints of present pain and suffering were competent to show her condition at that time, it was error to go beyond that, and permit the witness to narrate in detail her statements as to past pain, when it began, its origin, nature, severity, and attendant effects, covering more than a year before his examination. That some of those statements were admissible is clear, for they were of past pain and suffering; and, when that information is necessary to a correct diagnosis, statements of it may be testified to by the physician as forming a part of the basis of his opinion. *Knox vs. Wheelock*, 54 Vt. 150; *Hathaway's Adm's. vs. National Life Ins. Co.*, 48 Vt. 325. In such cases the statements of the patient have no hearsay quality, but are treated merely as observed facts, forming part of the physician's data, and bearing upon the weight of his opinion, without regard to their correctness or incorrectness. But here the court went further, and allowed the statements of past pain to be argued to the jury as evidence tending to show the fact of such pain; and in its charge it allowed the jury to consider all those statements, with no other limitation than that they must not be weighed as tending to show that the intestate received an injury from the defendant. That was error; for when those statements were used as direct testimonial evidence of the truth of what they asserted, they were carried beyond their legitimate scope, for, as to that, they were nothing but hearsay. 3 Wig. Ev. Sec. 1720.

The counts in case allege that the intestate employed the defendants to treat her. The plaintiff testified in his opening, however, and it appeared without question during the whole trial, that he himself made the contract, and with the defendant Brock alone, and he told what the contract was. The defendant Brock offered to testify, in his own favor, to the contract, claiming that it was different in some respects from what the plaintiff testified it was. But the court excluded him as incompetent, under Pub.

St. 1906. This was error, for the contract was originally made with the plaintiff acting for himself, and not for the intestate, who was his wife, and so he was a party to it, and was living and competent to testify, and had testified. This brought the matter within the exception of Section 1590 of the statute, which provides that, when an executor or administrator is a party, the other party shall not be permitted to testify in his own favor, "unless the contract in issue was originally made with a person who is living and competent to testify." The words "contract in issue," as there used, mean the contract in dispute or in question, and relate as well to the issues made by the evidence as to the issues made by the pleadings; and the contract here in question was brought forward by the plaintiff and made an issue by his evidence, but whether necessarily or not we need not inquire, for it was treated as necessary and material, both by the plaintiff and the court in its charge. Brock, therefore, was a competent witness to the contract. But that did not make him a competent witness generally, for the purpose of the exception is, not to shut the mouth of the defendant as to contracts made with parties still living and competent to testify, but to preserve equality of testimonial competency, beyond which the exception does not go, and the exclusion of the statute is operative.

Brock also offered to testify to certain other things as collateral. But they were not collateral, but bore directly on the cause of action in issue and on trial, and antedated the death of the intestate. The same is true of the defendant Roselle's deposition in this respect; and, as she is a party to the action, and not a party to the contract between the plaintiff and Brock, the deposition was properly excluded.

An answer to a question in H. P. Hinkley's deposition, introduced by the defendant, was stricken out, to which the defendant excepted. But as the bill of exceptions does not show on what ground, and nothing is pointed out in the transcript to show it, the exception is not considered. For the same reason we do not consider the exceptions to the exclusion of Brock's diploma,

and his offer to show that Roselle is a graduate of the American School of Osteopathy at Kirksville, and had the reputation of being, and was in fact, a competent and skillful practitioner of osteopathy.

The defendant Brock's motion for a verdict should have been sustained, for to warrant the finding of malpractice it was necessary to have medical expert testimony to show it, and there was none; but, on the contrary, there was such testimony tending to show that the treatment was proper, and according to the principles and practice of osteopathy. It was not enough to show merely that the treatment was injurious, but it was necessary to go further, and show by competent witnesses that the requisite care and skill was not exercised in giving it—for that was the only question, according to the plaintiff's brief—and that was not done. Such is the doctrine of all the cases. *Sheldon vs. Wright*, 80 Vt. 298, 67 Atl. 807; *Sims vs. Parker*, 41 Ill. App. 284; *De Long vs. Delaney*, 206 Pa. 226, 55 Atl. 965; *Feeney vs. Spalding*, 89 Me. 111, 35 Atl. 1027. This virtually disposes of the question made on the admission of the testimony of the plaintiff's medical expert, given in answer to certain hypothetical questions, for the testimony was not offered for the purpose of showing that the treatment was not proper osteopathic treatment, but only to show that it was injurious, which did not tend to show malpractice without more, and there was no more.

The second count alleges that the defendants professed to be practicing the art of healing and curing sick and diseased people after and by the methods of the school of osteopathy, and that the intestate employed them "as such healers." The third count declares against them generally as physicians and surgeons without more. No claim is made in argument that osteopathy is not a distinct school of practice, and could not well be, for the statute recognizes it as such, by making special provisions regulating it. There was no testimony tending to show that the defendants treated the intestate otherwise than as osteopaths, nor that any other kind of treatment was contracted for, expected, desired, or

given. But the court, after giving the jury the rule as to the care and skill the defendants were bound to exercise if they treated the case as osteopaths, went on to give them the rule applicable to the profession generally, if they found that the defendants did not treat the case as osteopaths. This was error, for there being no evidence that they treated the case otherwise than as osteopaths, and osteopathy being a distinct school of practice, the treatment was to be tested by the principles and practice of that school, and not by the principles and practice of any other school, nor of the profession generally; and the testimony on the part of the defendants tended to show that the treatment complained of was according to the principles and practice of osteopathy, and also tended to show what those principles and that practice are. It was also error because it submitted an issue dehors the evidence. Indeed it is not really contended that this was not error, but claimed that there is no exception sufficiently explicit to be available. But one quite sufficient is pointed out in the transcript.

The gist of the petition for a new trial on the ground of newly discovered evidence is that the condition of the intestate after her last treatment was not due to that, as the plaintiff claimed, but due to a fall she got in alighting from the electric car on her return from that treatment, about which nothing was shown on trial. The defendant's counsel say in their brief that if it be held that the testimony objected to should have been excluded for the reasons assigned, perhaps the newly discovered evidence would not be material, because there would be no occasion to show the true cause of that condition; but that even then there would remain the plaintiff's testimony of a conversation he and the intestate had with Brock, in which she claimed that he hurt her at the last treatment, and that the newly discovered evidence would be applicable and pertinent to that, and so would stand for consideration. But that testimony did not tend to show malpractice, for the most that can be claimed for it is an implied admission by Brock that he might have hurt her then by reason

of overrating her strength to endure the treatment. But error of judgment is not enough, unless it is so gross as to be inconsistent with due care; and there is nothing to show that, for it could not be inferred from results alone. Therefore there is nothing left to which the newly discovered evidence can apply, and hence there is no ground for considering the question of its sufficiency.

In cases like this the bringing of such a petition might sometimes well be deferred until the case is disposed of on the exceptions, as it can be brought at any time within two years after the rendition of the original judgment.

Judgment reversed, petition dismissed with costs, and cause remanded.

CHAPTER XV.

DAMAGES

The item which is most important to every practitioner is the damages which may be awarded to the plaintiff. Damages are always computed in money and that question is decided by the jury. The jury decides what amount of money will compensate the plaintiff for the injuries which he has received. That is known to the law as compensatory damages. Punitive damages are what the words indicate, damages by way of punishment, to prevent the recurrence of the act. Punitive damages will not be considered here. The amount which may be fixed by the jury as compensatory damages is practically wholly within the discretion of the jury in malpractice cases and may be very small or may be, and frequently are, very large.

For instance, the jury may compensate the plaintiff for "pain and suffering." There is a great deal more latitude in this than in an action for breach of contract. In an action for breach of contract the jury decides the cold hard fact, "how much money did the plaintiff lose because of the breach, or what was the value of the contract." Such damages may often be arrived at to the cent but it is much different where the jury has to assess damages for "pain and suffering." A jury when it considers or assesses the damages for pain and suffering is often swayed by sympathy for the injured, and prejudiced for or against the plaintiff. The make up of the jury is another determining factor. Some juries are hardened to pain and suffering, are calloused to the finer feelings and give a very small amount for pain and suffering, while other jurors who are high strung and who themselves have a mortal horror of pain would feel disposed and do give large sums of money as damages for a very small amount of pain and suffering.

However, that is getting into the lawyers' side of it for it is his duty to remove such persons from the jury list if possible. Frequently the juries have granted sums of five, ten, fifteen, twenty-five and even fifty thousand dollars as damages for pain and suffering.

Another element which the jury may take into consideration besides pain and suffering is the loss of time caused by the injury. This is a money damage and depends upon the salary or money which the plaintiff was earning. Thus, if the plaintiff's earning power was high, the damages for loss of time would be great, and if the plaintiff's earning power was small, the damages would be small.

The loss of any of the members of the plaintiff's body would be proper for the jury to consider, and the amount of damages which the jury could fix, might be large or small, depending on the make up of the jury, their prejudices and likes or dislikes.

Possibility of permanent injury may also be considered by the jury and one jury might give a small amount and another jury a large amount.

Delay in getting a cure or aggravation of injuries might also be considered by the jury and in consideration of that the jury would probably consider loss of time and pain and suffering during the increased delay caused by the practitioner.

McCracken vs. Smathers, 122 N. C. 799; 29 S. E. 354. The jury may take into consideration the injury the plaintiff sustained by the unskillful treatment of the case. Of such would be the pain, loss of time, suffering, loss of teeth and delay in getting a cure and probability of permanent injury necessarily consequent upon the injury sustained by the maltreatment.

The jury may also take into consideration not only the pain and suffering which the plaintiff has suffered in the past, or the loss of time which the plaintiff has suffered in the past, but also the pain, suffering and loss of time which the plaintiff may suffer in the future. Under such circumstances who can say what sum the jury would bring in?

Often the jury members each put down his own opinion of the damages and divide the total by twelve to arrive at an average. And the peculiar thing about it is that after the first thousand, the jury doesn't seem to think much of adding on a few more even thousands for good measure.

In an action for malpractice damages may be given for past, present and prospective injuries, for expense incurred, for suffering that the patient has undergone or will undergo. *Becker vs. Janinski*, 27 Abb. N. C. 45, 15 N. Y. Supp. 675.

Of course a close distinction must be made between the pain and suffering which is caused by the disease itself and the additional pain and suffering which is produced by the negligence of the practitioner. For instance, a patient suffering with neuritis, where the practitioner was negligent, there would be a certain amount of pain and suffering which goes with neuritis anyway and the plaintiff would not be compensated for that but only for the additional pain and suffering caused by the negligence of the practitioner.

In a suit against a surgeon for malpractice in treating an injury, the plaintiff is not entitled to recover anything on account of pain and suffering caused by the injury, but only for such additional pain and suffering as is produced by the negligence or want of skill of the defendant in the treatment. *Wenger vs. Calder*, 78 Ill. 275.

For further instance, taking the case of neuritis, there would have been pain and suffering even though properly and skilfully treated. Plaintiff could not recover for that pain and suffering but only for the additional pain and suffering caused by the negligence of the practitioner. The following instruction was given by the court in the case of *Leisenring vs. La Croix*, 94 N. W. p. 1010;

"If you find for the plaintiff in this case, you will by your verdict award plaintiff such damages as are claimed in the petition and you find have been proven by a preponderance of the evidence in this case; plaintiff is not entitled to recover the amount paid

for the operation at Sioux City, or his hospital expenses at that place, or any other expense incurred by him ; but this evidence and all other evidence relating to plaintiff's condition of health at the time defendant began to treat him, the length of time he was being treated by defendant or others, the pain and suffering, if any, the present condition of his limb, all are matters proper to be considered by you, and to be taken in account by you in making up your verdict in this case, bearing in mind, however, that you are to compensate plaintiff only for such injury and damage as may have been caused by reason of the negligence of defendant, and not charge defendant with any damage that may have been sustained by plaintiff had his injury been properly and skillfully treated."

Where damages are claimed for negligent diagnosing the jury would consider pain, suffering, past, present and prospective loss of time, probability of permanent injury, delay in getting correct treatment and even probability that he never would be cured because correct diagnose was not made in time.

If patient got well, the pain and suffering damage would be the additional pain and suffering beginning with the time the disease should have been diagnosed correctly and ending when the patient did get correct diagnosing, and if a cure was harder then than formerly, for such additional pain and suffering, etc. In other words, the jury might guess anything. The damages because of incorrect diagnosis are more problematical than any other and this paragraph on damages from incorrect diagnosis is inserted here so that those practitioners who diagnose on medical lines may know their liabilities.

Van Sickie vs. Doolittle, 155 N. W. 1007. Our only difficulty is in determining whether death might have been found in consequence of such negligence. This is always a question of probability in such case, for no one can say absolutely whether a patient, even though properly treated, would have survived. The inquiry necessarily is whether recovery would have been the more

likely in that event and a cure in all reasonable probability have been effected. The child had enjoyed good health previously. She might have been found to have been suffering from an ailment which would have given way readily to proper treatment had such treatment been accorded her, and from these and other facts the conclusion reached that but for defendant's negligence she would have recovered. The cause should have gone to the jury. Reversed.

In a recent case \$7,500 was given in a suit against a magnetic healer. Notice what the physicians (allopath) testified to, in effect causing a prejudice against magnetic healers. The writer knows nothing of magnetic healers but ventures to say that prejudice would be attempted to influence the jury against any new system.

"Where treatment to plaintiff by magnetic healers, consisting of manipulation, resulted in rupturing the ligaments connecting the spine and hip bone, and permanently injuring the back, spine, and pelvic organs, causing plaintiff great pain, etc., and physicians testified that the effect would be to shorten plaintiff's life, a verdict for \$7,500 was not excessive." *Longan vs. Wetmer* 79 S. W. 655, 180 Mo. 322, 64 L. R. A. 969, 103 Am. St. Rep. 573.

As stated before, the practitioner is responsible not for the effects of the disease itself but only for the effects of his negligence. With respect to incurable diseases, of course, any jury or court could only guess what injury resulted from the negligence and in such case the law would not necessarily put its hand into the practitioner's pocket and take his money and give it to the plaintiff.

The Court says—

"The only reasonable conclusion to be reached from the undisputed facts is that plaintiff was suffering at the time of the defendant's first visit from an incurable disease and the worst that could be hoped for ever from the standpoint of the specialist

was alleviation of pain and postponing the inevitable blunders which followed further." It was not possible for the jury to separate the degree of pain which the plaintiff suffered, as induced by the disease of glaucoma from that which might have resulted had a different course of treatment been pursued. And the verdict as originally given or as reduced by the court represents no more than a mere guess founded on possibilities not warranted by any evidence in the case."

Also holds—

The implied contract of a physician or surgeon is not to cure but to treat the disease with reasonable diligence and skill.

McCandlers vs. McWha, 22 Pa. 261.

Potter vs. Warner, 91 Pa. 362.

Ruhards vs. Willard, 176 Pa. 181.

Even if there be negligence it does not always follow that the practitioner be liable in damages, because the negligence must be the proximate cause of the injury.

Proximate cause is defined as follows: The proximate cause of an event is that which in a natural and continuous sequence unbroken by any new cause produces the event. The consequence must be the natural and probable consequence. The natural and probable consequences are those which human foresight can foresee because they happen so frequently that they may be expected to happen again.

In *DeBruine vs. Voskuil, et al.*, 169 N. W. 288, the court says:

"There is one claim of negligence as to which there is sufficient evidence to sustain the finding of the jury, and that is that the defendant Voskuil was negligent in not discovering the fact that the injury has not healed at the time of the removal of the extension apparatus, and in their further failure to call upon the patient for 7 or 8 days thereafter. However, there is no evidence showing that this in any way contributed to or was a factor in producing the injury complained of. In fact, the attempted use of the

leg during that week, so far as the stiffness of the ankle joint is concerned, would have been helpful rather than otherwise."

McClarín vs. Grenzfelder, 136 S. W. 817; 147 Mo. App. 478.

In this case the defendant undertook to cure plaintiff of hernia by paraffin injection. Plaintiff later had peritonitis. In regard to the peritonitis, the court says—

"Moreover the injection of it (paraffin if a regular and approved method of treating the ailment, would not necessarily lay defendant liable even if it induced the peritonitis, for untoward results sometimes follow the most scientific surgery."

Where the symptoms present might be diagnosed by physicians of ordinary skill as typhoid fever, multiple neuritis, or infantile paralysis, and the physician diagnosed the case as typhoid fever, while in fact the patient suffered from infantile paralysis, which is incurable, and the treatment of the physician for typhoid was not negligent or unskillful and in no way contributed to the subsequent condition of the patient, the physician was not liable for malpractice.

CHAPTER XVI.

SERVICES RENDERED GRATUITOUSLY AND FIRST AID

Brydges vs. Cunningham, 124 P. 131; 69 Wash. 8.

As has been seen in the foregoing chapter malpractice suits are suits for damages arising from a violation of duty. According to the majority of cases that duty which is the duty of exercising reasonable care, may spring either from the employment or from holding oneself out as competent and assuming charge of the case. Where a practitioner is employed, he either receives compensation or there is an implied promise to pay compensation. That means that the practitioner is entitled to receive a fee even though he does not receive it.

There is another class of cases however, where a practitioner may not charge a fee, or where he may refuse to accept a fee or where it is understood that he shall not charge a fee, or where it is understood that the work is Charity. According to the majority of well considered opinions and cases it does not make any difference whether the service is gratuitous or not because the liability is based on the violation of duty which the practitioner owes the patient.

Thus, if you as a Chiropractor take a charity case you are bound to use the same reasonable care that you would be required to use on a patient who paid you for your services. In other words, the poor charity patient is entitled to receive the same care as his richer and more fortunate brother.

The cases are a little confused but they are here given for your consideration.

Peck vs. Hutchinson, 55 N. W. Rep. 511.

We can discover no good reason why the degree of care to be used by the physician or surgeon should be less in case his

services are gratuitously rendered. But we need not discuss the question. In the absence of an express contract in such cases, the law implies that the defendant should be compensated for his services.

Pettigrew vs. Lewis (Kan.) 26 Pac Rep. 458; 14 Am. & Eng. Enc. Law, p. 78.

However, McClelland in Civil Malpractice, p. 521 says, "a physician or surgeon attending gratuitously is liable for gross negligence only, (Sherman & Redfield on Neg. p. 432), but it does not relieve from a reasonable degree of care.

Shields vs. Blackbarne, 1 H. Black, 159.

Nelson vs. MacIntosh, 1 Starkie, 188.

Nelson vs. Brett, 11 M. & W., 113.

Peppin vs. Sheppard, 11 Price, 400.

Gladwell vs. Steggall, 5 Burg. N. C. 733.

The less the payment made in return for diligence the less diligence that is expected, and if no payment at all is made as little diligence as possible is usually expected, though it may be that some is. Amos. Science on law.

On the question of gratuitous service the New York case has held, the fact the physician never asked any pay for his services, is inadmissible.

N. Y. 1872. In an action against a physician for malpractice, evidence that he had not asked any pay for his services is inadmissible. *Baird vs. Gillette*, 47 N. Y. 186.

Possibly the latest and best considered case is that of *Morrison vs. Altig*, reported in 138 N. W. 510, an Iowa case decided in 1912.

1912. *Morrison vs. Altig*, 138 N. W. 510.

In this case the defendant was a student at a veterinary college—home in vacation, had castrated colts and was asked to treat a horse with a sweenied shoulder.

Defendant told them he was not a veterinarian but a student and had not completed his course at school. He was reluctant to

undertake the treatment. He finally made an incision in the atrophied shoulder injected a quantity of turpentine and advised the horse to be turned out to pasture—horse got worse. Defendant refused to accept pay.

The Court holds:

The right to recover damages in an action of this character is based on the theory that the defendant has failed to discharge a legal duty which he owed the plaintiff, resulting in the injury complained of. The nature and extent of that duty, if any, depends upon the circumstances under which the defendant undertook the service. If he was holding himself out to the public or to the plaintiff as a competent veterinary surgeon, and as such undertook to treat the horse, he was in duty bound to bring to that service the learning, skill and care which characterized the profession generally in that neighborhood or vicinity and this duty would be none the less obligatory because he performed the service without compensation. 2 Cooley on Torts (3rd Ed.) 1393.

If, however, he did not hold himself out as a competent veterinarian, if he was as yet a mere student or learner or undergraduate, and frankly disclosed that fact and consented to undertake the treatment only upon the urgent request of the plaintiff and without compensation and performed the service honestly and to the best of his ability, then his duty to the plaintiff was discharged, and he is not liable in this action, even though the same service if performed by one claiming to be a competent surgeon might justly be characterized as negligent and unskillful in a high degree.

Citing:

Higgins vs. McCable, 126 Mass. 13; 30 Am. Rep. 642.

McNeve vs. Lowe, 40 Ill. 209.

Carroll vs. Bell, (B. C.) 15 West Law Rep. 32.

Even a practicing physician who informs a person employing him that he lacks experience or skill in the service he is asked to perform is charged with no liability on account of his professional incompetence.

Lorenz vs. Jackson, 88 Hun 200; 34 N. Y. Supp. 652.

The same principle is set forth in the case of *McNevin vs. Lowe*, 40 Ill. 209, a very early case in 1866.

"If a person holds himself out to the public as a physician he must be held to ordinary care and skill in every case of which he assumes the charge, whether in the particular case he has received fees or not.

Where he does not profess to be a physician, however, nor to practice as such, and is merely asked his advice as a friend or a neighbor, he does not incur any professional responsibility."

McNevin vs. Lowe, 40 Ill. 209.

In this connection would be considered the question which many Chiropractors have asked, "What are we to do in the case of First Aid?"

The answer is, "If you give first aid or any other kind of aid as a professional man and for compensation, you would be liable to exercise care and diligence. If you set a broken finger, extracted slivers, bound up wounds, gave medicine or did anything outside of Chiropractic, you would be liable as an allopath physician, but on the other hand if you made no charge, refused any compensation and advised the patient that you were not an allopath physician and that you were a Chiropractor, and that your business is not setting broken bones, etc., you would not be liable for the care, etc., of an allopath physician. When you do that then, according to the cases decided by law, you would not be liable even if you were negligent according to the standard of the allopath physician. The fact that no pay is received is important because it is very strong evidence that the treatment was not given by the practitioner in a professional capacity but instead in a volunteer capacity, and without any holding out to the patient that the practitioner has the knowledge and skill of an allopath physician.

In other words, when you render first aid you must do so in the same manner as any other volunteer or ordinary person would

do and not as a professional man, and you must not receive compensation therefor.

The great danger is that some Chiropractors are called "Doctor" and they sometimes swell up on the title, and when called upon to help in a "first aid case" are more often to swell up and pretend a knowledge of the case which he does not possess, for the purpose of impressing the public. It is rather hard for a fellow of this kind to say, "Well, this is out of my line, I am a Chiropractor not an allopath physician and I don't claim special skill in 'setting broken bones,' etc., but I will do what I can for nothing."

The writer's advice is to be very careful of "First Aid" or "gratuitous cases."

In the case of a midwife who was asked some advice concerning treatment of eyes. This was in 1878. The midwife was a volunteer, receiving no compensation for that advice.

The Court says: "A person who without special qualification volunteers to attend the sick, can at most be only required to exercise the skill and diligence usually bestowed by persons of like qualifications under like circumstances. To hold otherwise would be to place responsibility in damages upon all who make mistakes in the performance of kindly offices for the sick.

Higgins vs. McCabe, 126 Mass. 13; 30 Am. Rep. 642.

CHAPTER XVII.

X-RAY

The exact status of the X ray with respect to medical science has not yet been fully determined. It is used for treatment by some M. D.'s, although the results of such treatment or the physiological changes that take place in the human system have never been satisfactorily explained to the writer.

The X ray is also in the terms of the M. D. used for diagnosis; in other words, to find out the ailment of the patient. The allopath physician uses it to determine foreign substances in the human body, to detect fractures and dislocations of bones. The dentist uses the X ray to determine abscessed teeth. The Chiropractor uses the X ray to detect subluxations of the spinal column and, more important, to detect the positions or direction of the subluxations.

The X ray apparatus is not only complicated but in the hands of the inexperienced operator it may be called dangerous, because it uses a small amount of electricity at a high voltage which, if it came into contact with either the practitioner or the patient, might cause death. It is further dangerous in case of over-exposure, because of the burning effect which the X ray has upon the skin in such cases. The danger comes with prolonged exposures, such as are given in treatments or fluoroscopy. It is the accumulative effect of the X rays upon a given area of skin that may eventually produce a so-called X ray burn. There is very little danger of producing an X ray burn when the apparatus is being used for picture work only and in the hands of an experienced technician. There was a time, however, when this type of work was considered more dangerous, but in the last few years there have been

so many improvements in the accessories used with X ray equipment that the time element for the exposure has been cut to a minimum, thus lessening the degree of danger for this class of X ray work.

The bad effect of continued use has been declared by physicians and surgeons.

The writer will not deal with the use of the X ray for treatment, because that is claimed to be inherently a part of the practice of the allopathic physician, and the only standard by which a practitioner would be chargeable would be the standard of the regular physician. Thus the Chiropractor at least in the practice of Chiropractic theory does not treat by means of the X ray. By "treatment" is meant using X ray as a curative agency. It is a well known fact Chiropractors use the X ray to detect the subluxations of the spine, but they do not use the X ray as a method or means of treatment. If, however, any Chiropractor were to use an X ray machine on a patient *for the purpose of treatment*, that would change the rule so that the practitioner would be required to use and possess the knowledge and skill of the regular or allopath physician and surgeon.

For the purpose of taking pictures of the human body to detect fractures, dislocations, subluxations and presence of foreign bodies, the question is no longer one of treatment. The operator stands in the position of an expert in charge of a complicated apparatus, which is dangerous in the hands of an inexperienced or incompetent technician. The operator must have knowledge regarding the X rays and their effects on the skin of human beings in case of over-exposure. The operator must have skill in operating the X ray machine and in addition the operator must see that knowledge and skill is used in taking the X ray picture.

The amount of knowledge and skill required would not be the highest skill nor the lowest skill, nor in all probability would the skill and knowledge be measured by either the Chiropractor or the allopathic physician, but, on the other hand, would be meas-

ured by the standard of the ordinary X ray operator—that is, the question would probably be, “Did the defendant in taking the X ray picture of the patient exercise that degree of care, diligence, skill and judgment which other X ray operators in the same or similar localities usually exercise under like or similar circumstances, having due regard to the advanced state of the science at the time.”

Considering the preceding paragraphs the reader will understand the absolute necessity of a thorough knowledge of X ray technique. Any Chiropractor doing Spinographic work or contemplating doing Spinographic work should possess or take a course of instruction along this phase of X ray work, that they may learn and know the proper methods to pursue and will exercise that degree of care which is absolutely necessary.

According to the cases of record, there is some risk of burning the patient while taking the picture if an over-exposure is given, and especially so when in the hands of an incompetent operator or someone who has failed to take any instruction in this work. Where there appears to be any likelihood of danger, which can be recognized by the experienced technician, it is well to inform the patient of the danger and then the patient may agree to assume the risk. Unless such an assumption were in writing the patient could swear he never assumed it; the written assumption of risk is always safer, but not practicable.

However, even such an assumption of risk would not release the operator from the duty of using care in operation of the machine but would only be the assumption of risks attending the use of X rays in a careful and skillful manner. This is illustrated by the Missouri decision.

Where a physician, proposing to treat plaintiff's hand with X rays for eczema, informed him that there was always danger connected with the treatment, and plaintiff agreed to assume the risk, such assumption was limited to risks attending the use of the X rays in a careful and skillful manner; it being contrary to public policy to permit the doctrine of assumed risk to include an

injury caused by the physician's negligence in exposing plaintiff's hand so close to the tube of the machine that it was seriously burned.

Hales vs. Raines, 141 S. W. 917; 162 Mo. App. 46.

That rule has been well stated in the following opinion:

"In an action for malpractice in administering X ray treatment, the petition contained a general allegation of negligence, but the proof showed that the kind of treatment and the extent of application was proper, except that defendant was negligent in exposing plaintiff's hand too close to the machine. The court charged that one holding himself out as a physician is bound to use reasonable skill in the treatment of those who employ him, and if defendant undertook to treat plaintiff's hand, and in doing so negligently applied the X rays, exposing the hand to such currents eight or nine times for such periods of time as to cause the skin, muscles and contents of the palm to be severely burned, and by such negligence plaintiff's hand was permanently injured, then the jury should find for plaintiff. Held, objectionable as misleading, in failing to require that the jury, in order to find for plaintiff, must find the specific act of negligence shown by the proof, to-wit: the placing of the hand too close to the tube of the machine."

Hales vs. Raines, 141 S. W. 917; 162 Mo. App. 46.

The following excerpt is along the same lines:

"The proper form of submitting the question whether X ray treatment was in accordance with the established practice of the medical profession for the treatment of the disease from which plaintiff was suffering was whether an ordinarily skillful and prudent physician would have adopted that treatment under the circumstances."

Core vs. Brockman, 119 S. W. 1082; 138 Mo. App. 231.

Much has been said about sensitive skin and whether or not an operator should know or find out if the patient has a sensitive skin or was susceptible to X ray burns. There seems to be a lot

of confusion regarding sensitive skin or susceptibility to burns and the true rule seems to be that the X ray operator must exercise that degree of care, diligence and skill and judgment which other X ray operators in the same or similar localities usually exercise under the same or similar circumstances, having due regard to the advanced state of the science at the time.

In other words, the plaintiff would have to prove that other X-ray operators under the above rule would have recognized that the patient was susceptible to X ray burns.

Where a woman is sent by her surgeon, a man of recognized professional ability, by whom she has been under treatment, to another physician, and X ray operator, in order that he may locate a supposed fractured rib, and there is nothing about her condition to show that she would be peculiarly liable to injury by the rays, the operator is justified in relying upon the judgment of the surgeon that her condition is such as to warrant the use of the rays.

Sweeney vs. Erving, 35 App. D. C. 57, judgment affirmed 33 S. Ct. 416; 228 U. S. 233; 57 L. Ed. 815.

Along with the other duties which an X ray operator owes to the public and to his patients is not to use defective machinery. As stated before, the X ray machine is complicated and is dangerous in the hands of inexperienced or incompetent technician. The operator must test it to see if in proper working order and that all parts of such machine are in such good order that no injury may come to the patient.

On the same theory that the dentist or surgeon is responsible for defective instruments so the X ray operator within certain limits would be liable for defective X ray apparatus.

Another interesting question comes up here and that is, to what extent is the X ray necessary to an ascertainment of the subluxations of the spine.

In the first place, it has been shown that the physician must use due care to ascertain the physical facts from which to make a diagnosis and that the physician must also use due care to

ascertain the physical facts from which they must decide the kind of treatment.

It has been further remarked that due care depends upon what care, etc., other practitioners in the same or similar localities usually exercise in the light of the advanced state of the science. For instance, a number of years ago there was a case of malpractice for unskillful treatment of a broken leg because they failed to take an X ray. The court held it was not negligence.

However, as the degree of care required depends upon the advanced state of the science, there may shortly come a time when to make a correct analysis of the subluxations of the spine it would be deemed necessary for the ordinary Chiropractor to make or verify his diagnosis that way.

If that time comes, it probably would be negligence not to use an X ray if by hand the subluxation was missed or read incorrectly, and if by X ray the subluxation would have been discovered and read correctly.

The opinion stating non use of X ray is not negligence follows:

"It is claimed that the defendants were negligent and guilty of careless and unskillful treatment of the plaintiff. (*De Bruine vs. Voskuil*, 169 N. W. 288.) because they failed to cause an X ray picture of plaintiff's broken leg to be made while they were treating it. At the time of her injury plaintiff lived at Cedar Grove. There was no X ray apparatus at or near that place, and there was no suitable electrical current available. Neither does it appear from the testimony that, had an X ray picture been taken during the treatment, it would have shown that no callus was being formed at the point of fracture. Notwithstanding, the Court submitted to the jury the question whether or not the failure of the defendants to take or cause to be taken an X ray picture was negligence on the part of the defendants. Plaintiff's attorneys cite us to no case holding that it is as a matter of law negligence for an attending physician and surgeon to fail to avail himself of the use of an X ray apparatus in the case of fracture,

and upon the facts shown here we cannot so hold, particularly as in this case it was comparatively easy to determine whether or not the ends of the bones were in opposition.

Snearly vs. McCarthy (Ia.) 161 N. W. 108.

Wells vs. Ferry-Baker Lbr. Co., 57 Wash. 658; 107 Pac. 869, 29 L. R. A. (N. S.) 426.

It does not appear at what stage of the healing period, if at all, an X ray would have disclosed whether or not a callus was being formed, and we shall not now attempt to determine under what circumstances the failure of an attending physician and surgeon to use an X ray apparatus in cases of fracture should be held to be evidence from which an inference of negligence or unskillful treatment may be drawn. It is clear that under the facts in this case the failure to procure an X ray during the course of treatment did not amount to negligence or unskillful treatment."

The difference in the use of the X ray for the taking of pictures on the one hand and for the treatment of disease is discussed in the case of *Henslin vs. Wheaton*, 97 N. W. 882; 91 Minn. 219.

This was an X ray case in 1904—one of the first to be had. The plaintiff had inhaled a gold tooth and defendant physician used the X ray to find the tooth—result was an X ray burn on back.

Plaintiff tried to prove the exposure was negligent by testimony of one Prof. Freeman who was not an allopath. Prof. Freeman showed he was thoroughly familiar with X ray. The lower court refused his testimony on the ground that only an allopath physician could testify against the defendant as to negligence. The Court says: "The application of the X ray to plaintiff was not for the purpose of treating any disease or ailment from which he suffered but for the purpose of locating if possible a foreign substance thought to be in his lungs. While it perhaps may in some instances be used as a remedial agent, it was not so employed in this case. The so-called X rays discovered by Roentgen have been recognized and known to scientists both in

and out of the medical profession for some eight years. During this time the apparatus for the generation of X rays, together with the fluoroscope, has been used very generally by electricians, professors of physics, skiagraphers, physicians and others for experimental purposes. It is a scientific and mechanical appliance, the operation of which is the same in the hands of the college professor, or the physician of the allopathic, homeopathic or any other school of medicine. It may be applied by any person possessing the requisite scientific knowledge of its properties and there would seem to be no reason why its application to the human body may not be explained by any person who understands it. The rule in the Courtney case can, therefore, have no application to the case at bar. It might apply did it appear that the application of the X rays to plaintiff's person was for medical purposes and not for the scientific purpose of discovering the presence of a foreign substance in his lungs."

Sweeney vs. Erving, 228 U. S. 233; 21 Supreme Court. 1912. Case of malpractice for X ray burns. The defendant to prove the use was proper, produced witnesses. "Thereupon several practicing physicians of experience testified as experts (having qualified by showing an acquaintance with the literature on the subject and also some practical experience in the use of X ray apparatus). Upon the basis of the defendant's testimony respecting the character of his X ray apparatus and the manner of its use upon the plaintiff and the duration of the several exposures to which she was subjected, the experts testified that the machine was a good one of its kind, and that the manner in which it had been used upon the plaintiff was in accordance with the practice of careful and prudent X ray operators, and was as safe as exposures to the X ray apparatus could be made, and each of the witnesses further testified that according to his experience and reading it was not possible in the use of the X ray apparatus to guard absolutely against a resultant burn.

The plaintiff then asked for instruction that the burn was itself evidence of negligence and that burden of proof shifted to defendant to prove he was not negligence.

Supreme Court held, that plaintiff asked for an instruction which contained two propositions, one of which was bad—therefore court did not err in refusing the whole instruction.

Where *Res Ipsa Loquitur* applies the burden of proof does not shift but remains on plaintiff. It is recognized that there is a class of cases where the circumstances of the occurrence that caused the injury are of a character to give ground for a reasonable inference that if due care had been employed by the party charged with care in the premises, the thing that happened amiss would not have happened. In such cases it is said, *res Ipsa Loquitur*,—the thing speaks for itself; that is to say, if there is nothing to explain or rebut the inference that arises from the way the thing happened, it may fairly be found to have been occasioned by negligence.

In our opinion *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference, that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is necessary to be weighed, not necessarily to be accepted as sufficient; that they call for an explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict.

Res Ipsa Loquitur where it applies does not convert the defendant's general issue into an affirmative defense. When all the evidence is in the question for the jury is, whether the preponderance is with the plaintiff.

Along with the other duties which an X ray operator owes to the public and to his patients is not to use defective machinery. As stated before, the X ray machine is complicated and dangerous.

CHAPTER XVIII.

DEFECTIVE APPLIANCES

Upon the employment of the Chiropractor, the Chiropractor further represents that he will use safe and not defective appliances. Just as the surgeon implies that he will use instruments which are not rusty or defective, the Chiropractor represents that he will not use defective appliances. It is the duty of the Chiropractor to see that the appliances such as the adjusting table, are in good condition and not defective. If a spring should be out of order or should snap onto one of the patient's fingers there would probably be a liability on the part of the Chiropractor. The same care is demanded of the Chiropractor in examining the appliances which are used in the home. The Chiropractor must be careful and not use any defective appliances.

The same liability has been held where a dentist used un-cleansed instruments, causing the patient to become infected with a disease. When this takes place, it becomes a question for the jury to decide whether the practitioner used proper care.

Whether a person was inoculated with a contagious disease by means of contact with implements used by a dentist in cleaning her teeth and whether the inoculation was due to the want of proper care on the part of the dentist as to the cleanliness of the implements, held, under the evidence, questions for the jury.

Bates vs. Dr. King Co., 77 N. E. 1154; 191 Mass. 585.

The Chiropractor owes the further duty to his patients of keeping the office clean, of keeping his table clean, of taking extra precautions when he has adjusted patients having contagious diseases. The towels in the office should be so clean as to bar any possibility of transmission of any contagious disease. This is on

the same theory that a physician has been held liable where he used unsterilized instruments, causing the patient to contract a private disease.

In an action against a physician for malpractice in using unsterilized instruments, whereby plaintiff contracted a private disease, evidence held to sustain a verdict for plaintiff.

Holland vs. Bridenstine, 104 P. 626, 55 Wash. 470.

One of the duties of the practitioner is to see that the patient is not injured while under his control. For instance, if a physician places a patient under an anesthetic and on the way back from the operating table the patient fell from the car, the physician would be liable. So with a Chiropractor, if a patient fell or was injured while getting on or off a Chiropractic table without any fault on the part of the patient, the Chiropractor probably would be liable because it would be the Chiropractor's duty to see that the patient got on and off the table safely. If the patient was negligent, however, and contributed to the injury, the patient could not recover.

The Chiropractor probably owes the duty to the patient to safely conduct the patient to and from the room, although the possibility of injury in this manner is very small.

In an action for personal injuries caused by plaintiff's falling while unconscious and under the medical attention of defendants, from a car on which she was being removed, down into an elevator shaft, evidence examined and held to support a finding that defendant's employment included the safe return of plaintiff to her room at the hospital from the operating room while still unconscious.

Haase vs. Morton & Morton, 115 N. W. 921; 138 Iowa, 205, 16 Ann. Cas. 350.

Just as the instruments and equipment of the dentist and the surgeon are the tools, tables, gauze, bandages, medicine, so the bare hands and the adjusting table are the tools of the Chiropractor. The X-ray machine is also an appliance but is dealt with in a separate chapter.

The Chiropractor's hands, clothing and body must be free from contagion and the table must be in good condition and the duty is placed upon the Chiropractor to see that it is in good condition.

There is the further duty of seeing that the patient is so placed on the table so that the adjustment will cause no injury. Take one of the cases which was tried recently. The patient had a large goitre on the neck which was in such a position that when the patient was placed upon the table the part of his goitre rested upon the head rest. The plaintiff claimed that an adjustment of the cervical vertebrae of the patient a blood vessel burst, causing the goitre to apparently swell to three or four times its normal size. The man was taken to the hospital, the flow of blood stopped and the physicans and surgeons testified the injury was the result of the adjustment. The patient brought suit for twenty or twenty-five thousand dollars and on a trial by jury was awarded damages of \$4,000. Of course the negligence of the Chiropractor, if any, was the so placing the body of the patient so that the goitre was upon the head rest.

There have been several claims of malpractice resulting from improper placing of the body on the table. Several have claimed damages on account of broken ribs and broken sternums. Where, of course, this was caused by the negligence of the Chiropractor, he would be liable in damages.

The Chiropractor in all cases must be more careful with old and frail people.

Another case is where the patient claimed the table was defective and because one of the springs was out of position that it caught his finger, injuring it severely. In that case it was manifestly the Chiropractor's duty to keep his table in good condition and his failure to do so would be such negligence as would authorize a recovery.

CHAPTER XIX.

PRACTICE WITHOUT CONSENT

No practitioner of any school has the right to treat or operate upon the body of a patient, until he has secured the consent of the patient.

In the first place there is no state system of medicine, no universal system and each person has the right to choose that system which he thinks will remove the ailment. He is in the capacity of the employer and the practitioner is in the capacity of an employee. In that capacity the patient has the right to tell the practitioner how far he shall go and what the practitioner shall do and what he shall not do. Of course, if the patient directs the practitioner to stop, the practitioner must stop, and his responsibility ceases then, except for negligence acts then committed before directed to stop.

The fact that a patient discontinued the treatment of a physician before she should have done so, and thereby augmented an injury caused by the negligence or incompetency of the physician, did not preclude her recovery for the injury caused by the physician.

For instance, if the patient tells the surgeon to operate on his right ear and the surgeon operates on his left ear, the surgeon would be liable in damages therefor. Where the patient directed the surgeon to operate on his right ear that would be considered an express consent to operate on the right ear. If the patient told the surgeon to do what was necessary, or put himself in the surgeon's control to do what was in the opinion of the surgeon necessary, that would be considered implied consent—that is, consent

would be implied from the acts and conversation of the patient and the practitioner. If the practitioner went further than the consent of the patient's express or implied, the practitioner would be liable and the form of action would be more or less in the nature of assault and battery. The following is a brief statement of the rule.

Where a physician performs an operation without a patient's consent, either express or implied, he is liable in damages therefor.

Rolater vs. Strain, 137 P. 96; 39 Okl. 572; 50 L. R. A. (N. S.) 880.

The same rule is stated slightly differently in a well considered Minnesota case, which holds that such an operation would be unlawful and without authority from the patient.

A surgical operation by a physician on the body of his patient is unlawful, where performed without the express or implied consent of the patient; and, in the absence of such consent, the physician has no authority, implied or otherwise, to perform the same.

Mohr vs. Williams, 104 N. W. 12; 95 Minn. 261, 1 L. R. A. (N. S.) 439; 111 Am. St. Rep. 462.

This rule becomes very important in the case of minors and insane persons. Adults are supposed to have the right to choose their own system of healing but hardly so with minors or insane persons. In law such persons cannot make contracts and are not usually liable for debts contracted with them.

Usually the custody of the minor children is in the hands of the parents, whose duty it is to look after the physical well-being of their children. If the parents have control or custody over the minor children, then only the parent can authorize any practitioner to treat or operate upon the minor.

Hence every practitioner should obey this rule. In the case of minor children, procure the consent of the parents and do not be satisfied with the direction of the uncle, aunt or sister to proceed.

In the case of orphan children or insane persons a guardian

is appointed by the Court who has, according to the law, custody of both the person and the estate of the minor or insane person. In case there are no parents having custody of the child then procure the consent to adjust the minor or insane person from the guardian. If you should not do this you would be liable in damages. This is illustrated by the following case. Where a child 11 years old was taken to surgeon by her adult sister, for an adenoid operation, and the child died during an operation, the surgeon was liable to the parents, in the absence of proof that they had authorized the daughter to have the operation performed.

Rishworth vs. Moss, 159 S. W. 122.

Under some of the decisions if the patient is an infant, insane or did not assent to the Chiropractic method, then the jury would have to decide this question: Is the practice of Chiropractic as applied to the treatment of the case in question so contrary to common sense and reason that it would be negligent for such practitioner to undertake to treat the disease? That such might be the rule is suggested in *Spead vs. Tomlinson*, 59 Atl. Rep 376, a Christian Science suit, which says: "Had she been an infant, non compos, or had never assented to Christian Science treatment, then the question whether the practice of Christian Science is so contrary to common sense and reason that it would be negligent for such a practitioner to undertake to treat the disease, might be open to consideration by a jury."

There is now pending a case in which the widow brought a malpractice action against allopath physicians for performing an autopsy without the consent of the widow, claiming that the doctors, without the widow's consent or knowledge, there being no question of death by violence, performed this autopsy.

Many questions have been asked concerning the right of unlicensed practitioners to collect fees due them from patients for professional services. The law holds they cannot recover and attention is called to the following cases:

The fact that a physician and surgeon is not licensed to

practice in Illinois is not material, where the action is predicated upon notes given for services rendered.

Brunswick vs. Hurley, 131 Ill. App. 235.

Where a note was executed for medical services by a payee who was without a license to practice medicine in Indiana, when the practice of medicine without a license was prohibited by Burns' Ann. St. 1908, Sec. 8410, the note was unenforceable in the hands of the payee for illegality of consideration.

State Bank of Greentown vs. Lawrence, 96 N. E. 947; 177 Ind. 515; 42 L. R. A. (N. S.) 326.

One not licensed to practice as a veterinary may not recover on a claim for the board of a horse in his possession as a veterinary for treatment.

Laurin vs. Caspari, 125 N. Y. S. 25; 140 App. Div. 887.

A recovery cannot be had for dental services, in the absence of proof that the practitioner was duly licensed to practice under the laws of the state.

O'Beirne vs. Carey, 150 N. Y. S. 666.

A physician practicing without the license prescribed by Sayles' Ann. Civ. St. 1897, arts 3777-3788, as amended in 1901 (Laws 1901, c. 12), requiring a license as a condition precedent to the right to practice medicine, cannot recover for professional services.

Swift vs. Kelly, 133 S. W. 901; 63 Tex. Civ. App. 270.

CHAPTER XX.

FEES—LIABILITY OF THIRD PARTY FOR SERVICES

The practitioner must look for his fees from the patient himself or to the third person who is under legal obligation to furnish medical aid to the patient. This does not include third parties who call practitioners or who bring patients in to the practitioner unless the third party actually promises to pay if the practitioner will come. The following cases illustrate this point clearly:

A wife has authority to bind the estate of her husband for the payment of all necessary professional services rendered by the family physician in attempting to save the life of her husband, who was in a desperate condition, owing to his attempted suicide, even though the husband was in a hospital, where he would receive attention from the staff physicians.

Prentice vs. Ladinski, 141 N. Y. S. 1005; 81 Misc. Rep. 42.

Ordinarily one who summons medical aid for another person is not liable for the value of the services, unless he stands in some relationship creating an obligation to furnish medical aid.

Vandalia R. Co. vs. Bryan, 110 N. E. 218; 60 Ind. App. 223.

That a person merely calls a physician to attend a third party does not raise an implied contract to pay therefor, unless he was under legal obligation to furnish such services, yet he is liable if there was in fact an actual contract to pay, though not express.

Ohio vs. Schaper Bros. Merc. Co. 163 S. W. 551; 180 Mo. App. 686.

The general rule, that where a person requests of another

the performance of services the law implies a promise to pay their reasonable value, does not apply in the case of a physician rendering professional services to a third person, where the relation to the third person of the one requesting them is not such as imports a legal obligation to provide them.

McGuire vs. Hughes, 101 N. E. 460; 207 N. Y. 516
affirming order (1910) 126 N. Y. S. 1137; 141 App
Div. 933.

CHAPTER XXI.

GENERAL ADVICE

Chiropractors should exercise great caution in the adjustment of the following classes of cases.

If you are in practice a great length of time you will have many people come to you, who are called pigeon breasted. Oftentimes these people are in such physical condition that the slightest pressure upon the sternum, might crack the sternum or a rib without the slightest fault on the part of the Chiropractor. Probably an additional pillow should be used in these cases.

The next class of patients who might cause trouble to a Chiropractor are those suffering with Potts' Disease or Tuberculosis of the spine.

Chiropractic adjustments according to the members of the profession, have proven beneficial to many sufferers from this disease but on the other hand there have been cases which have not responded and when taken to an M. D. are told that the Chiropractor ruined you; "You should have had absolute mobility, your spine in a cast instead of motion." The patient is thus incited to bring a malpractice case.

Another class of patients who may cause trouble to Chiropractors are patients who are in such a run down condition that thier bones are very, very brittle, so brittle in fact that a person of that description may break her leg turning over in bed or even in turning her around on the bed in order to give an adjustment. The moral of this is: Be very careful of such cases and let someone else move them so that in case anything like that should happen you would not be blamed for something you could not help. Syphilitic cases which have taken a large amount of

mercury have very brittle bones which may splinter under adjustments.

The fourth class of patients, who may give trouble to Chiropractors, even when the Chiropractors are wholly without fault, are composed of the apoplectic type—generally complaining of high blood pressure, albumen in the urine and arterio sclerosis, or hardening of the arteries.

This class of patients may have an apoplectic stroke at any time. Allopath physicians and no one else can tell even approximately when that stroke may occur. If it occurred near any adjustment the Chiropractor might be blamed for causing the stroke when as a matter of fact nothing that the Chiropractor did caused the stroke.

Chiropractic has had wonderful results in cases of high blood pressure, and the only advice the writer can give the Chiropractor in any of these cases is to be very careful where the Chiropractor even suspects that the patient may belong to any of the aforesaid classes.

If the writer were called upon to adjust any of the four classes I would first endeavor to protect myself by a contract drawn in somewhat the following manner:

First, in the states where the Chiropractor has a license but the Chiropractor wishes to protect himself against dangerous cases, the following is advised:

I, being fully advised of the merits of Chiropractic and satisfied with the Chiropractic theory of disease but being advised that on account of my physical condition there is more risk attendant to giving an adjustment than ordinary, therefore in consideration of the adjustment I do agree to and do assume the risks of injury or results of any adjustment given to me by D. B. Jones, if given in the exercise of the same care and diligence as is exercised by other Chiropractors in the same or similar communities in this state or elsewhere.

Date.

Signature.

In states where the Chiropractor has not got a license the following is advised:

In coming to the office of D. B. Jones, Chiropractor, for Chiropractic adjustments, I understand that he is to give me no medicine and that he does not make a diagnosis according to the standards of the regular or allopathic physician. I understand the theory of Chiropractic and I direct D. B. Jones, as a Chiropractor, to use such means as are necessary to find out which vertebra is out of alignment and to endeavor to put that vertebra back into alignment. I understand that D. B. Jones, Chiropractor, is not licensed to practice medicine or surgery or Chiropractic in the state of New York, and I only hold him responsible for exercising the same degree of care as is ordinarily exercised by other Chiropractors practicing in the same or similar communities in this state or elsewhere.

Date.

Signature.

In addition to this, in states where the Chiropractor has no license, it may be advisable also to add the element that the patient being advised on account of his physical condition there is more risk attendant to giving an adjustment than ordinary.

The Chiropractor must bear in mind that this is not a contract.

It is very improbable that any practitioner can make even a special contract with the patient to protect himself against liability for unskillfulness because such a contract would be against public policy, but a Chiropractor could probably make a special contract that in the event of any claim for malpractice that the plaintiff would only hold the practitioner liable for failure to exercise the care, skillfulness, knowledge and diligence usually exercised by Chiropractors in the same or similar localities under same or similar circumstances, with due regard to the advanced state of the science at the time, and the further statement that the patient

employed the Chiropractor solely for the purpose using the theory, principle and practice of the Chiropractic School.

As a general rule preliminary adjustments should be made lightly.

If ever you should be so unfortunate as to be sued for malpractice, be very careful about a loose tongue, especially in talking to the complaining patient or his attorney.

Remember they may testify concerning the conversations had with you and they may twist your conversation in such a way as to make it appear that you made damaging admissions. If you are careful about your tongue, be also careful of what you write. You must recognize that whatever remarks you make about the case or the patient may be misconstrued and twisted. For instance, expressions of malice or hatred or bitterness against the patient will be brought up against you as showing prejudice, or even malice, and expressions as to what you did in the case and why you did it might be brought up against you as admissions.





